-16-

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted]219

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, APPELLANT,

vs.

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, TRUSTEES, ESTATE OF JOHN M. CLAPP, DECEASED.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 2, 1917.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 558.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, APPELLANT,

vs.

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, TRUSTEES, ESTATE OF JOHN M. CLAPP, DECEASED.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

1 Court of Appeals of the District of Columbia.

JOSEPH J. DARLINGTON ET AL., APPELLANTS,
vs.
FRANKLIN K. LANE, ETC. } No. 3014.

Supreme Court of the District of Columbia.

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, trustees of the estate of John M. Clapp, deceased, plaintiffs,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, defendant. } In Equity. 33205.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

Bill.—Filed January 29, 1915.

In the Supreme Court of the District of Columbia.

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, trustees of the estate of John M. Clapp, deceased, plaintiffs,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, defendant. } In Equity. 33205.

To the Supreme Court of the District of Columbia, holding an Equity Court:

Your orators complain and say that they are citizens and residents of the city of Washington, in the District of Columbia, and
2 bring this complaint as trustees on behalf of the estate of John M. Clapp, deceased, the owner of the certain grant of land known as the Muscupiabe grant, in the State of California, hereinafter more particularly described, and that they bring this complaint against Franklin K. Lane, a citizen of the State of California, residing in the District of Columbia;

1. That in 1843 Michael White petitioned for a tract of land at the mouth of the Cajon de los Mejicanos. This petition was sustained and a judgment made by the Mexican governor of the Californias. February 8, 1853, a petition for confirmation of this grant was presented in the name of the original grantee to the board of commissioners, appointed to ascertain and settle private land claims,

and on March 6, 1855, the grant was confirmed by an order in these words:

"In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioner is valid, and it is therefore decreed that his application for a confirmation be allowed, with the following boundaries, to wit: On north and east by the foot of the mountain, on the south by the Agua Caliente, and on the west by the cottonwoods, which are on the other side of the creek, reference being had to the map accompanying the expediente."

An appeal was taken from this order of confirmation which was dismissed June 8, 1857. In 1867 instructions were issued by the surveyor general of California for the survey of this grant which was made and approved by him, the grant being commonly known as the Muscupiabe grant. This survey was, on July 11, 1868, forwarded by the surveyor general to the Land Department at Washington, D. C. In January, 1871, the Secretary of the Interior disapproved of the survey, but on the report of the surveyor general of June 10, 1872, which showed that the land included in the survey as made was less than that called for by the decree of confirmation, and that the grantee claimants were willing to accept under the survey as made, the Secretary of the Interior set aside his order of disapproval, approved of the survey, and, on June 22, 1872, the patent of the United States issued thereon.

2. May 29, 1885, a bill was filed in the name of the United States to set aside the patent because of alleged misrepresentations and fraud, resulting in the acceptance of the survey on which the patent issued, and this suit was prosecuted to the Supreme Court of the United States. U. S. v. Hancock, 133 U. S., 193. The court found that the allegations of fraud were not sustained, and respecting the question as to the correctness of the survey as made, it was said at page 197 of the opinion:

"Some question is made as to the correctness of the survey, and that turns as a question of fact upon what is meant by the expression 'Agua Caliente' in the various descriptions. If it means a stream known as Agua Caliente, then the Government has no cause to challenge the survey, for it includes less than was really confirmed, but if it means a district of country known by that name in the northwestern portion of the San Berna-dino Rancho, a
3 neighboring tract, then the survey was excessive. If it were necessary for us to determine this question, we think the evidence in the case indicates the stream and not the district was intended, but it is not the province of this court to correct a mere matter of survey like that. If made in good faith and unchallenged as this has been for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented."

3. It is under the grant as thus confirmed, surveyed, patented, and sustained by the decision of the Supreme Court of the United States

that the plaintiffs claim title through mean conveyances from the original owners and grantees.

4. That in the late nineties a question was raised as to the proper markings of a certain portion of the northern boundary of the grant, as surveyed and patented, and to reestablish the patented limits a contract was entered into by the land department with one George H. Perrin. The boundary of the Muscupiabe grant, as surveyed and patented in 1872, is irregular in form, showing forty-nine stations in the outer boundary. In the survey made by Perrin the original monuments were found and reestablished excepting between stations twenty and twenty-five. Between these two stations the survey, as made by Perrin, was protested by the owners under the Mexican grant because not following the calls in the patent, and this protest was carried to the Secretary of the Interior and considered in his decision of October 30, 1902, wherein, after a most exhaustive consideration, he refused to accept and approve of the Perrin survey and carefully laid down the rule under which the survey was to be made. A copy of the said decision of October 30, 1902, is hereto attached, marked "Plaintiffs' Exhibit A," and made a part of this bill as though herein set out in full.

5. A survey was made in accordance with the directions laid down in the said opinion of the Secretary of the Interior, commonly known as a Sickler survey, which survey was approved by the Commissioner of the General Land Office May 19, 1906, and by the Secretary of the Interior February 28, 1907.

6. That at the time of the filing of this bill the defendant, Franklin K. Lane, was and he still is Secretary of the Interior and as such has charge of the administration of the laws relating to the public lands and the administration of all grants made by Congress, and is sued in his official capacity as Secretary of the Interior.

7. That although the grant had been patented as long ago as 1872 and the question as to the reestablishment of the boundaries under the outstanding patent had been decided and determined by the final decision of the land department as long ago as 1902 and the survey made in accordance therewith had been duly accepted and approved by the Secretary of the Interior as long ago as 1907 the defendant, Franklin K. Lane, in a decision dated September 5, 1913, signed by Adrieus A. Jones, the First Assistant Secretary of the Interior, acting under the said defendant as by law provided, assumed jurisdiction of the matter of the reestablishment of the boundaries of this grant as patented and by order made therein rejected and held
4 for naught the said previously approved survey made by Sickler and directed the Commissioner of the General Land Office to take appropriate steps to reestablish and appropriately mark the Perrin line, previously rejected by the department, as herein set forth, the result of which order, if carried into effect will be the destruction of the markings of the survey of this grant by Sickler as approved, as hereinbefore stated in 1907; the casting of a cloud upon

the title of your orator as to the portion of the land falling between the two surveyed lines; the institution of numerous suits, greatly to the annoyance, prejudice, and irreparable loss, damage, and injury to your orator. A copy of the said decision of September 5, 1913, is hereto attached, marked "Plaintiffs' Exhibit B," and made a part hereof as though fully set out.

8. That thereupon the plaintiffs herein caused request to be made in formal manner of the said defendant Franklin K. Lane for the revocation of his said order of September 5, 1913, urging that the land in dispute had, by reason of the patent and the approved re-establishment survey hereinbefore referred to, become severed from the mass of the public domain and therefore beyond his jurisdiction and power of action as Secretary of the Interior, and this request has, under date of December 16, 1914, been denied and his previous order of September 5, 1913, contemplating the destruction of the existing survey and the institution of a new one is adhered to. A copy of the decision of December 16, 1914, is hereto attached and marked "Plaintiffs' Exhibit C" and made a part hereof as though set out herein in full.

9. That your orator has no adequate remedy at law and is otherwise remediless except in equity to prevent the carrying out of the arbitrary, unlawful, and unwarranted action of the defendant herein complained of.

Wherefore, your orator prays:

That your honor grant to your orator your writ of injunction, enjoining the defendant, Franklin K. Lane, Secretary of the Interior, as aforesaid, and his successors in office and all persons claiming to act under his authority or control, absolutely to desist and refrain from further proceeding under his said order of September 5, 1913, in attempted resurvey of your orator's grant, until your honor shall appoint and direct an order herein, and that upon such hearing the writ herein prayed be granted and continued until the final determination of this suit; and upon such final hearing be made permanent.

To the end that the defendant may if he can show why your orator should not have the relief hereby prayed and may full, true, and perfect answer make, according to the best of his knowledge, remembrance, information, and belief, to the several matters herein averred and set forth as fully and particularly as if the same were herein repeated, paragraph for paragraph, and he was thereto specifically interrogated, may it please your honor to grant unto your orator a writ of subpœna ad respondem, issuing out of and under the seal of this honorable court directed to the said defendant,

Franklin K. Lane, commanding him to be and appear and
5 make answer unto this bill of complaint and perform and abide by such order and decree herein, as before this court may seem to be required by the principles of equity and good conscience.

And that your orator may have such other or further relief in the premises as the nature of the circumstances of the case may require.

JOSEPH J. DARLINGTON,
JOHN H. CLAPP,
By F. W. CLEMENTS, *Att'y.*

ALEXANDER BRITTON,
EVANS BROWNE,
FRANCIS W. CLEMENTS,
Attorneys.

DISTRICT OF COLUMBIA, *ss:*

On this 28th day of January, 1915, before me personally appeared J. J. Darlington, one of the above-named plaintiffs, who made solemn oath that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

JOSEPH J. DARLINGTON.

Subscribed and sworn to before me this 28th day of January, 1915.

[SEAL.] I. H. LINTON,
Notary Public, D. C.

PLAINTIFFS' EXHIBIT A.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
Washington, D. C., January 8, 1915.

Pursuant to section 882 of the Revised Statutes I hereby certify that the annexed copy of decision of the Secretary of the Interior, dated October 30, 1902, in the matter of the resurvey of the North Boundary Rancho Muscupiabe, California, is a true copy as shown by the records and files of the Department of the Interior.

In testimony whereof I have hereunto subscribed my name, and caused the seal of the Department of the Interior to be affixed, the day and year first above written.

[SEAL.] BO SWEENY,
Assistant Secretary of the Interior.

Revenue stamp.

6 Department of the Interior.

E. F. B.
S. V. P.

29–1174. WASHINGTON, *October 30, 1902.*

In the matter of the resurvey of the north boundary, Rancho Muscupiabe, California.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: With your letter of September 18, 1902, you transmit the papers in the appeal of John M. Clapp from the decision of your

office of July 12, 1902, accepting the survey of the north boundary of the Rancho Muscupiabe, made by Deputy Surveyor Perrin in 1896, and declining to have any further survey made thereof.

The controversy relates to that portion of the north boundary of the rancho between stations 20 and 25, as established by Henry Hancock in 1867, running through township 1 north, ranges 4 and 5 west, and township 2 north, range 5 west. That portion of the boundary of said rancho was relocated by Deputy Surveyor Perrin in 1885 in connection with the survey of public lands north of said reservation which have since been set apart as a forest reserve. Final action upon Perrin's survey was suspended pending a suit by the United States to vacate and set aside the patent to said rancho, because of fraud in the location and survey of the grant. Said litigation having terminated with the decision of the Supreme Court sustaining the validity of said location (U. S. v. Hancock, 133; U. S., 193), the surveys were completed by Deputy Perrin in 1896 under special instructions.

It seems to be generally conceded that Perrin's resurvey of the boundary from station "M 1" (Muscupiabe 1) to "M 20" apparently conforms to the original survey of the grant as near as practicable, and "M 20" as located by Perrin appears to be generally accepted as the original monument established by Hancock, who surveyed the grant. The concurring proofs furnished by the reports of the several surveys and examinations made of this line and the finding of the mark "M 20" upon the tree is sufficient evidence to set at rest every question as to the correctness of that location and to fix it as a well-established monument.

In 1885 Perrin retraced the line from that station to station 2 by running N. 54° E.–30.15 chains to a burned sycamore stump. In resurveying this line in 1896 he ran from M 20 54° E. on a random line 20 chains to a blazed sycamore tree which he reported is known by old settlers as "M 21." He prolonged the line, however, to 30 chains and reported that he found no trace of sycamore tree or evidence of there ever having been a tree at that point. He says: "I therefore determine that the sycamore at 20 chains is the corner and, after correcting his course, he ran a true line and marked the sycamore found at 20 chains "M 21." Because of this discrep-
7 ancy in the two surveys and of other errors apparent on the face of the returns, he was required to show cause why he was unable to place confidence in the retracement of his course from 20 to 21, made in 1885, and why he should not return to the field and correct his survey. In response to said rule Perrin stated that the retracement made in 1885 was simply a reconnoissance and that he had not at that time found the sycamore which he afterwards identified as "M 20." He also pointed out inconsistencies that would result by reversing the course from station 25, which he considered properly identified—if the length of the line between 20 and 21 was fixed at 30 chains. The explanation of Perrin was considered a sufficient answer to the rule, and in view of the fact that there

appeared to be other evidences of such general looseness and occasional errors in the Hancock survey as to preclude a correct adjustment of it upon any theory your office, by letter of October 30, 1901, determined that the survey of Perrin as a compromise line appeared to be reasonable and it was deemed best to accept it. From that decision John M. Clapp, the owner of that portion of the grant affected by said resurvey, appealed to the department, but before a decision was rendered the papers, upon your request, were returned that you might be allowed to vacate your decision and to have a further examination made of said line as requested by appellant.

W. S. Owen, a special examiner, was then directed to resurvey the line between stations 20 and 25, which were regarded as fixed—with a view to having it established as the permanent line if his survey should be approved. He was specially instructed to run the line so as to include as much of the arable and slightly sloping land of the valley as he might deem would be a reasonable compliance with the purpose of the grant "without ascending over high projections of the irregular mountain side, thus striking a fair average line between hill and valley." His instructions were, substantially, to the effect that he should follow the foot of the mountain which you state is one of the positive and certain calls of the grant and a natural object or feature that controls in the location of said line.

Examiner Owen appears to have executed his work strictly in conformity with those instructions and as a result thereof he finds that the line between said stations as surveyed by Perrin "is a fairly good average between hill and valley and that it complies substantially with the terms of the grant." You approved said report, being satisfied from the separate reports of three special examiners that no possible theory or rule could be adopted which would accurately locate the line of the Hancock survey, and that it would be unwise to prolong the process of amending such line, except upon the clearest evidence of its location. It was, therefore, ordered that Perrin's survey be approved. John M. Clapp has again appealed from your decision.

The Mu-cupiabie grant was surveyed by Henry Hancock in 1867, according to the boundaries specified in the decree which gave "the foot of the mountain" as the north boundary. Hancock's survey was, at first, rejected by the Secretary of the Interior because
8 it did not conform to the decree of confirmation, but, subsequently, the survey was approved as conforming to the grant and thereupon patent issued. The question as to the correctness of that survey was involved in the suit by the United States against Hancock, supra, and was determined in favor of the survey. The United States has no authority to change or amend that line. It can only relocate the line as fixed by the Hancock survey in order that the public land surveys may be closed upon it, and the general rules that govern in the establishment of boundaries are applicable to and must control your office in relocating and establishing this line.

Those rules and the order in which they are usually considered are: First, natural boundaries; second, artificial marks; third, adjacent boundaries; and fourth, course and distance. These rules, however, are not inflexible, as where the location of monuments and objects called for are involved in doubt and obscurity and can not be ascertained with any reasonable degree of certainty, and where no mistake can reasonably be supposed in course and distance. The controlling principle in the location of boundaries being that what is most material and certain in a description must prevail over that which is less certain. Tyler on boundaries (30); Newsom v. Pryor's Lessees (7 Wheat., 7). But, where natural or artificial objects are wanting, course and distance must govern in the absence of a more certain call. "If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance though not safe guides are the only guides given us and must be used. Chinoweth v. Haskell's Lessees (3 Pet., 92).

Was Perrin's line established by the most material and most certain calls of the Hancock survey?

Examiner Owen, under the instructions of your office, appears to have tested Perrin's survey by the calls of the grant rather than by Hancock's field notes. He determined in his judgment what line should have been surveyed by Hancock according to the calls of the grant, and he therefore concluded that such was the line actually surveyed. Finding that all the original corners set by Hancock have been destroyed; that not one of them is to be found, and that no witness can be found who knows where any of those old corners stood, he says:

"Where would an intelligent surveyor, actuated by no motive save that of complying as nearly as possible with the terms of the grant, run the line from station 20 to station 25?"

Keeping ever in mind the department's injunction that both lengths of lines and topography must be considered in the location of this boundary, and that said lines should strike "a fair average line between hill and valley," following, as nearly as possible the foot of the mountain, the examiner has found a condition of affairs extremely difficult to unravel.

It can not be seen how the line actually run by Hancock could be ascertained with any reasonable degree of certainty by the rule adopted to determine it. While the foot of the mountain is
9 in one sense a permanent natural object or feature, it identifies no particular or definite spot by which the survey actually made can be located. It is a matter of judgment or opinion where the mountain ends and where the valley begins. The opinions of different persons upon that question would probably differ so widely as to leave the identification of the foot of the mountain in too much doubt and uncertainty to furnish a guide to determine the line actually run. The uncertain and indefinite character of such description

was recognized by Examiner Owen, especially with reference to the country along the line of this survey. He says:

The question of determining the foot of the mountain is an intensely difficult one, and is purely a matter of judgment, and construction of the definition of that phrase.

After stating that from the actual flat valley there rises an easy gentle slope "called a Mesa," and that the question whether the gentle slopes or mesas are a part of the mountain must be considered in fixing the foot of the mountain, he says: while one man of good judgment might interpret this as belonging to the mountain, another equally competent and experienced might insist that it has no connection with it whatever. It will thus be seen that a description so indefinite and uncertain which may change according to the opinions of men of equal judgment and experience can not be relied upon as a standard by which to fix the line of an actual survey in the execution of which the judgment of the surveyor as to what is the exact locus of the foot of the mountain has been exercised.

It does not appear from the returns of the Perrin survey of 1896, or from any of the reports of the examination thereof, that "M 21" of Hancock's survey has been identified sufficiently to warrant the termination of the line at 20 chains. The mere fact that Perrin found a blazed sycamore there having no distinguishing mark from other trees of the same kind, furnishes no proof that it is the original tree designated by Hancock as "M 21" especially when found by such utter disregard of distance and to a certain extent out of course. The rule that monuments will not invariably control where they are involved in doubt and obscurity and where no mistake can reasonably be supposed in course and distance, applies with great force in this case where the supposed monument contains no evidence of the identity of the original monument and where it can not reasonably be supposed that such excessive error in distance could have occurred.

In his survey of 1885 Perrin at 30.15 chains found a burned sycamore stump which he reported he was unable to determine whether it was station 21, as there were several burned sycamore stumps in the vicinity. He, however, accepted it as "M 21" and it certainly gratified the call better than the sycamore found at 20 chains being corroborated by course and distance. In his survey of 1896 he reports that at 30 chains he found no trace of a sycamore tree or evidence of their having been a tree at that point, and therefore determined that the sycamore at 20 chains is the corner which he marked "M 21." Examiner Owens, however, found the burned sycamore stump at about 30 chains, which is evidently the stump found and reported by Perrin in 1885.

In explaining why he discredited his survey of 1885, Perrin also stated that Hancock's field notes show that in running the line from 21 to 22 he crossed the creek at 1.00 chain, which is about the same distance (0.85) given by him (Perrin) running the line from "M 21" as established by his survey of 1896. That proves nothing, as Perrin's

field notes of the survey of 1885 show that in running the line to station 22 from the burned stump, he crossed a creek at 0.85 chains. Examiner Owens in running the line from the burned stump reports that he crossed it at 0.70 chains. This call was therefore gratified upon either line.

Examiner Owen submits with his report a diagram showing the relative position of the different lines of survey on which is marked a point "B" at 30 chains from "M 20." With reference to that point he says:

"If we begin at Perrin's Cor. 20 and run Hancock's course and distance to 21 we shall arrive at 'B' as shown on my sketch.

"A projection of Hancock's courses and distances from 'B' point has not been given on the plat for the reason that it lies very close to that run from the old sycamore stump (the blue line) and its position throughout may be readily inferred if desired.

Assuming that Perrin's station 20 is the original station 20 located by Hancock, and that monument 21 is not in existence and no evidence is available by which its location can be determined, except course and distance, station 21 must be located at point B if it, in fact, answers Hancock's call for course and distance, because, as said by the court in Chenoweth v. Haskell's Lessees, supra, in the absence of all others, course and distance "though not safe guides, are the only guides to govern us, and must be used."

You do not find that there is any evidence identifying Perrin's station 20 as the original station established by Hancock, but you refused to require him to prolong his line between 20-21 to 30 chains because it would carry the next two lines too far into the mountain and because of the discrepancies that would be shown by running the line from other well established monuments. Referring to the statement of Examiner Owen that if Hancock's boundary is reproduced from station 25 westward, it will fall nearly 4 chains southwesterly of Perrin's 23-24 and throw station 20 about 13 chains southwesterly of Perrin's 20. You say: "If the position is taken that exact figures of the patent are to govern it is quite as proper to begin at No. 25 as No. 20. The result would be to diminish the grant and enlarge the area of public lands."

Whether Hancock's line was or was not in fact carried too far into the mountain is a question that can not now be controlled by the department. The course suggested by you could be only justified upon the theory that monuments 20 and 25 are equally well established and no reason exists why one should be preferred to the other, and even in that event a reversal of courses and distances would not be justified unless they were found to coincide with the regular calls of the
11 patent. When, by reversing the direction, course, and distance do not coincide with the natural calls, or the natural calls can not be identified, the regular courses and distances must be followed. Ellenwood v. Standiff (42 Fed. Rep., 316); Simmons' Creek Co. v. Doran (142 U. S., 417).

You state that there is an element of uncertainty as to the identity of station 20 and that "it would be more regular to adopt a tolerably certain starting point, namely, corner No. 25, between the forks of a well-known creek at the other agreed and accepted corner." Examiner Owen is of the opinion also that every reasonable man must admit that station 25 in the forks of Devil's canon is probably nearer to the position where Hancock placed it than any other of Perrin's corners.

The Department is not impressed with that view. On the contrary, the conclusion to be drawn from the returns of the several surveys of 1867, 1885 and 1896, and from the reports of the examiners, is that the identity of station 20 has been established beyond reasonable doubt, if not positively. The survey of the line east of station 25 and west of station 20 has been accepted by your office and by the grant claimants as correct. In your letter of February 6, 1901, the surveyor general of California, you say: "From the corner 'M 1' (Muscupiabe 1) to the corner M 20, the resurvey of the Muscupiabe boundaries apparently conforms as nearly as practicable to the original patent, and the location of M 20 has apparently never been questioned." It is also conceded by the appellant that the line west of 20 and east of 25 conforms substantially to the line described in the patent. Referring to the absence of original monuments between 20 and 25, he says:

There seems to be, however, no great amount of doubt as to the location of station No. 20, and it has been generally accepted by the different surveyors. Station No. 26 and the stations east of said 26 are not, so far as I am aware, now in dispute, and may therefore be considered and adopted as being substantially correct * * *

If station 19 has been correctly located, and no evidence now appears to the contrary, there is no reasonable ground upon which the correctness of the location of station 20 can be involved in doubt, in view of the fact that it not only responds to Hancock's call for course and distance, but Perrin reports that he found a sycamore tree on right bank of creek, course S. W.—the same description given by Hancock—from which he cut an overgrowth of about 2½ inches, and found "old mark 'M 20.'" Examiner Hollyday says he saw the chip that was taken from the sycamore tree above referred to, upon which the mark "M 2" is plainly seen. He also reports that three settlers, whose names he gives, told him that the point established by Perrin is about the point where station 20 was originally located, and adds: "I have every reason to believe that this tree is undoubtedly the old original station No. 20." Besides, the distance from station 19, 4.90 chs., is too short to admit of any great extent of error in chaining. If there is any evidence lacking to establish the identity of the mark as the original mark placed by Hancock, it is sufficiently supplied by the call for

12 'a sycamore 16 inches in diameter (Perrin 24) on the right bank of a creek * * * course southwest," which responds to the call for course and distance.

Station 25 has not been so clearly identified. From station 24 Hancock ran "N. 26 30′—105.71 chains, to a walnut tree four inches in diameter. Station at the forks of a canon on the left bank of a stream 12 links wide, course south 8 degrees west." Perrin running the same course found a walnut tree 10 inches in diameter "at forks of Devil's Canon Creek" 96.61 chains. Hollyday found Perrin's corner at 95.40 chains, which he says is a walnut tree having evidence of old blaze. There is no mark to indicate that it was the tree established by Hancock as station 25. His report shows that there are several walnut trees near Perrin's station 25, but there are no walnut trees within two or three chains of the forks, and that it is near the left bank of the west fork, but he does not state how near. Hancock calls for the corner on the left bank. Examiner Owen believes that Perrin's station 25 is nearer to the place where Hancock located it than any of the other corners, because of its position at the foot of the mountain, and because the forks of a well-known canon is a topographical feature that can be unmistakably and positively indicated.

The forks of the canon identifies no particular spot and does not, of itself, answer the call. "At the forks of a canon on the left bank of a stream" is merely descriptive of locality, and, unless the corner is found and identified, course and distance can not be disregarded. In Budd v. Brooke (3 Gill., 198), the call was for an oak tree standing upon a point at the mouth of a creek. The court said:

The fact that the boundary called for is represented by the patent as standing upon a point at the mouth of a creek, is, in the event of its loss, too vague and indefinite to control the positive expressions of the grant, as to course and distance. By pursuing the course and distance, we have the fixed and specified means of obtaining the identity of the spot where the line is to terminate. To reject the course and distance, is to determine that the particular spot on which the boundary stood is ascertained with reasonable certainty. The statement in the patent, that it stood on a point at the mouth of a creek, is not, of itself, sufficient evidence of its identical locality. It is not intended by this to discredit the station as it has been considered by appellant sufficiently established for all practical purposes. Referring to the station 20 he says: "I believe station 25 is not so well established but as it is described as being at the forks of a canon on the left bank of a stream twelve links wide, it must necessarily be very near the said forks and its location can not vary very much."

As the appellant considers that its identity has been sufficiently established, which is concurred in by your office, it will be so accepted, but it has not been so well established that it should be accepted as the beginning point to control other monuments that have been established with much greater certainty, especially when it does not coincide therewith or meet any known call of the grant.

13 The mere fact that other points of the grant exhibit greater discrepancies between courses and distances given in the patent and those accepted and acquiesced in by all parties, is not a reason

for disregarding course and distance in other parts of the line where monuments can not be found. Where monuments have been found or the location sufficiently identified and acquiesced in, course and distance must yield whether it be longer or shorter.

A protest has been filed by J. Victor Jessee in behalf of himself and other settlers along said boundary against the reconsideration of your decision approving Perrin's survey, asking that they be given an opportunity to defend their rights. He states that he is personally acquainted and familiar with every topographical call, course and distance, and station along the boundaries of said grant having made the survey with Deputy Perrin that it was he who found Perrin's stations 20, 21, and 22, which are beyond doubt the original corners established by Hancock.

No part of said line is in controversy, except that portion between stations 20 and 25. If any natural or artificial object indicating or marking Hancock's line of survey can be found they must necessarily control, and all parties in interest should be afforded an opportunity to establish such monuments if they can be found; but if they can not be identified as Hancock's original corners or stations by some ascertained monument or object the line of survey must be established by the course and distance given in the patent but closing upon station 25, irrespective of course and distance.

The case is therefore remanded with direction that a survey of the grant be made between stations 20 and 25 as now established in accordance with the views contained herein after giving notice to all parties in interest as above directed.

Your decision is modified accordingly and the papers are returned herewith.

Very respectfully,

(Signed) E. A. HITCHCOCK,
Secretary.

DEFENDANT'S EXHIBIT B.

Department of the Interior. D-19946.

WASHINGTON, D. C., *September 5, 1913.*

Muscupiabe Grant.

The Commissioner of the General Land Office.

SIR: The department has considered your letters of May 16 and June 11, 1913, relative to the protests of Lafayette Mehham and C. L. Cate against the decision of this department, dated February 28, 1907, approving the survey of Deputy Surveyor William A. Sickler in the reestablishment of the boundary of the Mus-
14 cupiabe Rancho, between stations 20 and 25 thereof. In your letter of May 16, 1913, you give a full statement of the essential facts of the case.

The Muscupiabe grant was patented on June 22, 1872, in accordance with the plat of survey approved on June 21, 1872. The survey was executed by Deputy Henry Hancock.

Doubt having arisen as to the boundaries of the grant, a contract was entered into with George H. Perrin, a contract deputy surveyor for its reestablishment. The plat of Hancock's survey showed 49 stations in the boundary, of which stations 21, 22, 23, and 24, are involved in this inquiry, which affects less than 300 acres of land.

Perrin's survey was approved by the General Land Office on October 30, 1901, after having been suspended for many years and subjected to close scrutiny, and mature consideration. The then owner of the grant therefore filed a protest against the Perrin survey between stations 20 and 25, and on March 27, 1902, your predecessor directed an examiner of surveys to make a careful examination of the Perrin survey and to report his findings. This examination and report were made, and after considering the same, the General Land Office declined to revoke its approval of the Perrin survey. October 30, 1902, the department reversed and vacated the decisions of your bureau and directed that a new line be established, saying:

No part of said line is in controversy except that portion between stations 20 and 25. If any natural or artificial objects indicating or marking Hancock's line of survey can be found, they must necessarily control and all parties in interest should be afforded an opportunity to establish such monuments, if they can be found. But if they can not be identified as Hancock's original corners or stations by some ascertained monuments or object, the line of survey must be established by the course and distance given in the patent, but closing upon station 25, irrespective of course and distance.

Pursuant to the instructions of the department a contract was entered into with Deputy Surveyer William A. Sickler for the reestablishment of that part of the boundary in dispute. The Sickler survey was approved by the General Land Office on May 19, 1906, and by the department on February 28, 1907.

Stations 20 and 25 of the grant have been positively identified, and there can be no doubt that they were correctly represented upon the plats of Perrin and Sickler, and located by their surveys.

From station 20 Hancock ran from a sycamore tree 16 inches in diameter, station on right bank of creek 10 links wide, course southwest, up said creek, north 54 degrees east, 30 chains, to a sycamore 30 inches in diameter, to station 21; thence south 51 degrees east, crossing a creek 10 links wide, course southwest, at 1 chain, 43 chains to a granite rock, 12 by 14 by 18 inches, in a rock mound, station at base of mountains; thence south 8 degrees and 30 minutes west, 62 chains, to station 23; thence south 64 degrees east, 150 chains, to station 24; thence north 26 degrees and 30 minutes east, 103 chains, 71 links, to a walnut tree 4 inches in diameter, station 25, at the forks of canyon on the left bank of stream, 12 inches wide, course south, 8 degrees west.

15 Sickler's survey follows Hancock's courses and distances, beginning at station 20 and closing at station 25, except that the distance between 24 and 25, instead of being 103.71 chains, was 85.70 chains. In other words, the discrepancy in the distance between

stations 20 and 25, following Hancock's courses, was arbitrarily deducted from the distance between stations 24 and 25.

Perrin's line, beginning at station 20 ran north 52¾ degrees east, 20 chains; thence south 50 degrees east, 42.94 chains; thence south 8 degrees and 30 minutes west, 62 chains; thence south 64 degrees east, 158.20 chains; thence north 26 degrees and 30 minutes east, 96.61 chains, to station 25.

It appears that Perrin did not extend the line from station 20 to 30 chains, as called for in the field notes of the Hancock survey, because to do so would be to disregard the topography given by Hancock as well as a sycamore tree which he adopted as station 21. This tree corresponded with that described in Hancock's field notes and bore evidence of having been marked. Moreover, adopting that tree as station 21, he would on the next call cross the creek referred to by Hancock at substantially the correct distance and with a slight variation of the course. He found evidences of the corner at station 22.

One of the examiners of surveys who examined Perrin's work in the field found that to extend the line between stations 20 and 21 to 35 chains it would be necessary to cross the creek referred to by Hancock several times, and that the 20 chains *paint* would fall in the bed of the creek. This examiner found no evidence of a sycamore tree or stump 30 chains from station 21 nor any other evidence of a corner.

The substantial correctness of Perrin's work has also been attested by two other examiners of surveys.

From what has been stated it appears that the one fact which may be said to have been satisfactorily proven by Sickler's survey was that the specific distances given by Hancock can not be reconciled with the undoubted locations of stations 20 and 25. There is and was no warrant in holding that the error in distance made by Hancock was wholly between stations 24 and 25, nor is there any fact disclosed which would warrant an affirmative finding that the defect in the Hancock survey was wholly a matter of distance in one or all of the lines. The fact of error in his field notes having been established and the precise nature of the error not appearing, it may be that the distances between each of the stations from 20 to 25 are too great; that the error was between any two of the stations or that such error arose alone from Hancock's failure to correctly return his courses. Under such circumstances the courses and distances given by Hancock should not be resorted to as determinative of any question until every source of information has been exhausted. The instructions to Surveyor Sickler clearly contemplated that he should avail himself of any competent evidence. It is obvious from the record that he contented himself with running a line under the technical rule that distance must yield to course where they
16 cannot be reconciled, which line, under the facts of the case, was wholly arbitrary and unsupported by anything that

could induce a belief that it accurately marked the boundaries of this grant.

Were there nothing with this record tending to sustain Perrin's survey as the correct relocation of stations 21, 22, 23 and 24 of the Hancock survey; were it conceded that Perrin's survey arbitrarily deducted 10 chains from the first and 8 chains from the last course it would still be entitled to as much respect as Sickler's survey, which just as arbitrarily deducted the entire 18 chains between stations 24 and 25. Perrin's survey having been approved and rights thereunder having attached, the department was not justified, upon the ground that it was arbitrary, in setting it aside in favor of a survey wholly lacking in any evidence of correctness as a relocation of the Hancock survey except such as were afforded by courses and distances clearly shown to have been incompatible.

With the papers transmitted by you are certain affidavits, to which you refer. These affidavits, in connection with the physical facts referred to by Perrin in his field notes and by the examiners who inspected Perrin's works, go far toward convincing the department that Perrin's survey was, substantially, a relocation of the Hancock survey.

One of the affiants, J. D. Newell, alleged that he was employed in the year 1883 as head chairman in a survey of the boundaries of this rancho made by one William Reynolds, who was employed by the then owner of the grant, John Hancock; that Hancock was present at and superintended the erection of the monuments of that survey; that station 21 was established at a sycamore tree whose top had been cut off and whose trunk had been burned; that he visited said station 21 on August 14, 1905, and found said sycamore; that the tree was in the same condition as when first seen, except that there had been carved thereon the letter M and the figures 21; that south 51 degrees east 43 chains from said sycamore a monument was constructed of a pile of rocks 18 inches high and 3 feet in diameter, and upon one of the rocks were inscribed the letter M and the figures 22; that he found the rock above mentioned on August 14, 1905. He also described the erection of monuments at stations 23 and 24 and the subsequent identification of both in the month of August, 1905.

Samuel Martin, another of the affiants referred to, alleged that in the year 1880 he purchased the possessory rights of one Simpson in a tract of land, the southwesterly boundary of which is that portion of the line of the Muscupiabe Rancho between stations 21 and 22. He identifies the sycamore tree referred to by Newell and in Perrin's field notes and alleges that the same was universally accepted by all persons in the community as truly marking said station 21. He also described and identified station 22. Martin further refers to the adjustment of the difference in the year 1896 between himself and one Meyers, who owned the land immediately south of the line between stations 21 and 22, whereby a wire fence was constructed

between the sycamore tree at station 21 and the pile of rocks at station 22 as marking the boundaries of the rancho.

17 Elizabeth Martin, the wife of said Samuel Martin, alleged that in 1873 her father, William Brown, settled upon public land and built a house thereon at a point about a quarter of a mile northeast from station 21; that she was then 12 years old and had resided upon the land continuously, with the exception of about one year; that station 21 was marked in 1873 by a sycamore tree, which had inscribed thereon the letter M and the figures 21; that about twenty-eight years prior to the date of her affidavit some unknown person cut off the top of the tree and burned the trunk thereof, obliterating the marks referred to; that about the time her father settled upon the land aforesaid a controversy arose between him and John Hancock, the then owner of the rancho as to the location of station 21, which resulted in a survey, at their mutual expense, which design*a*ted the sycamore tree as station 21; and that this designation was accepted by both parties.

There is also on file the affidavit of W. L. Brown, city engineer of San Bernardino, California, alleging that during April 1907, he visited the land in controversy, and found at 20 chains north, 54 degrees and 30 minutes east, from station 20, a sycamore tree 3 feet in diameter with the top cut off about 25 feet above the ground and badly burned on the western side for 12 feet above the ground, which had been marked by the Forest Service, in 1896, as a corner common to the Muscupiabe Rancho and the San Bernardino National Forest. This tree was the one adopted by Perrin as station 21 and referred to in the affidavits of Newell and the Martins. This affidavit was corroborated by C. L. Cate and Lafayette Mecham.

In Ayers v. Watson (137 U. S., 584) the Supreme Court of the United States held:

Courts have always been liberal in receiving evidence with regard to boundaries which would not be strictly competent in the establishment of other facts. Old surveys, perambulation of boundaries, even reputation, are constantly received on the question of boundaries of large tracts of land. The declarations of surveyors made at the time of making a survey have been admitted.

Upon consideration of the entire record, the department is convinced that the setting aside of the Perrin survey and the approval of that made by Sickler was entirely unwarranted by anything then or now before it. There would have been equal justification in proceeding from station 25, and, reversing Hancock's courses, closing arbitrarily on station 20, regardless of course and distance between station 21 and 20, which would have thrown all land in controversy outside the rancho. Under these circumstances, the approval of the Sickler survey is vacated and that survey is hereby rejected and held for naught; the line established by Perrin between stations 20 and 25 is adopted as the boundary of the grant, and you are directed to take appropriate steps to reestablish and appropriately mark Perrin's line and the lines of the public lands affected thereby.

The department concurs in your recommendation that the settlers in the territory involved be permitted to amend their entries
18 to include the area taken from them by the erroneous approval of the Sickler survey.

The record is herewith returned.

(Signed) ANDRIEUS A. JONES,
First Assistant Secretary.

PLAINTIFF'S EXHIBIT C.

Department of the Interior.

WASHINGTON, *December 16, 1914.*

D-19946.

Muscupiabe grant. "E." 158,889.

Motion denied.

Motion for rehearing.

By departmental decision of September 5, 1913, the Commissioner of the General Land Office was directed to take proper steps to reestablished and properly mark the lines and monuments of the Muscupiabe Rancho from stations 20 to 25 thereof in accordance with the reestablishment survey made by George H. Perrin of the Hancock lines, and the approval of the survey of that portion made by William A. Sickler was vacated and Sickler's survey rejected and held for naught. A motion for rehearing has been filed by the grant claimant.

It is urged in support of the motion that irrespective of the relative merits of the Perrin and Sickler reestablishment surveys, the department was without proper authority to disturb the Sickler survey which had been approved by the department Februa-y 28, 1907, and had stood for more than six years as the correct line of the grant boundary.

This line of argument might be applied in behalf of the Perrin survey which was approved October 30, 1901, after thorough investigation and careful consideration.

The Hancock survey is the one which governs the limits of the grant, and the effort has been to properly reestablish the lines of that survey. The department is convinced that the Perrin lines more accurately delineate the original survey than does the later survey made by Sickler. The Perrin survey should not have been disturbed. The present purpose of the department is to correct the error which was made when that survey was set aside and the Sickler survey substituted therefor.

The motion is denied.

(Signed) A. A. JONES.
First Assistant Secretary.

19 Motion to dismiss.

Filed February 18, 1915.

* * * * * * *

Comes now the defendant, by his attorneys, and moves to dismiss the bill herein filed; and for cause shows:

1. That the plaintiffs have not in or by their bill exhibited a cause for relief in equity in that it appears, on the face of the bill and its exhibits,

(*a*) That such vested right or title as plaintiffs possess in the lands known as the Muscupiabe Grant rest upon the patent issued by the United States on June 22, 1872, as averred in the first paragraph of the bill, pursuant to and describing the land demarcated by the so-called Hancock survey, and in no way upon the so-called Sickler survey;

(*b*) That neither the Perrin nor the Sickler survey or retracements of the lines of the Hancock survey could increase or diminish, nor did they undertake to increase or diminish, the amount of land actually conveyed by the United States, under the patent aforesaid, to the owners of the Muscupiabe Grant, but were merely surveys to ascertain and to locate on the ground the lines of the Hancock survey, in order to ascertain where the line of the public domain ends and the line of the Muscupiabe Grant commences;

(*c*) That the duty of ascertaining and determining what are public lands of the United States subject to survey and disposal under the public land laws devolves by law upon the Secretary of the Interior;

(*d*) That the authority for making, correcting, and retracing official public surveys is wholly and exclusively within the jurisdiction of the Secretary and, as such, he is charged by law with the duty of the making, correcting, and retracing of such public surveys, and the same involves the exercise of judgment and discretion.

(*e*) That, as the bill and exhibits show, the Secretary is merely endeavoring to ascertain and determine where the lines of the Muscupiabe Grant or Rancho, between stations 20 and 25 of the Hancock survey, as surveyed and patented, actually are located so that the same may be adjusted with reference to the public domain contiguous thereto, and not to resurvey said grant nor alter the lines of the land actually conveyed by the patent aforesaid.

2. That in essence and effect this bill seeks a review by the court of the action of the Secretary of the Interior in a matter over which he has sole and exclusive jurisdiction and concerning which his functions and actions are wholly discretionary and are not subject to control or review by the courts in any direct proceeding for injunction or otherwise.

3. That the legal title to the land affected by the Perrin and Sickler surveys, and in controversy in this suit, is either in the plaintiff

or in the United States, and in no event in the defendant;
20 that there is an absence of a necessary party, in this: that upon the point as to whether the land lying between the lines of the Perrin survey and the Sickler survey is a part of the public domain of the United States, the United States is entitled to be heard, but has not been made a party to this suit and has not, in this behalf, consented to be sued.

Wherefore he prays that the bill be dismissed, with his reasonable costs, and that he be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.

By his attorneys:

PRESTON C. WEST,
Solicitor for the Department of the Interior.
C. EDWARD WRIGHT,
Assistant Attorney.

Opinion.

Filed July 25, 1916.

* * * * * * *

The Secretary of the Interior is not undertaking in any way to change or amend the patent originally granted, but merely endeavoring to ascertain its boundaries.

The bill is dismissed. Settle decree on notice.

By the court:

WALTER I. MCCOY, *Justice.*

Decree.

Filed July 26, 1916.

* * * * * * *

This cause came on to be heard on defendant's motion to dismiss the bill of complaint herein filed, and was argued by counsel; whereupon on consideration thereof, the court having been fully advised in the premises, it is, this 26th day of July, 1916,

Ordered, adjudged, and decreed that the motion to dismiss be, and the same hereby is, sustained, and that the bill of complaint be, and the same hereby is, dismissed, with costs to the defendant to be taxed by the clerk.

By the court:

WALTER I. MCCOY, *Justice.*

From the foregoing decree plaintiffs pray an appeal on the day aforesaid, in open court, to the Court of Appeals, and the same is hereby allowed, and the penalty of the appeal bond for costs is fixed at $100, or, in lieu thereof, a deposit of $50.

By the court:

WALTER I. MCCOY, *Justice.*

21 Assignments of error.

Filed July 27, 1916.

* * * * * * *

The appellants, Joseph J. Darlington et al., hereby designate the following assignments of error in the certain final decree of the court, entered in the above-entitled cause July 26, 1915, dismissing the bill of complaint filed therein by plaintiffs:

1. In failing to find and hold that as the Muscupiabe grant had been surveyed and a patent issued according to such survey in 1872, the grant and survey thereof sustained by the Supreme Court of the United States Jan. 27, 1890 (U. S. v. Hancock, 133 U. S., 193), and the boundaries reestablished, lost or destroyed monuments being replaced, by a survey made under the direction of the Secretary of the Interior and approved by that officer, that thereby the jurisdiction of the Interior Department over said grant, including the boundaries thereof, was at an end.

2. In failing to find and hold that the survey of this grant made under the order of the Secretary of the Interior given in 1902, under which the calls in the prior patent issued under the grant were reestablished, was in effect a nunc pro tunc survey of the grant; in other words, it replaced or reestablished the monuments called for in the survey on which the patent issued, and the patent, together with the resurvey, are entitled to the same protection as had a new patent issued on the grant following the resurvey reestablishing the monuments and fixing the calls in the survey on which the patent was issued.

3. In failing to find and hold that the order and direction for the new survey of this grant was but an attempt to reopen a controversy settled under the final decision of the Secretary of the Interior for more than eleven years, and on the same record and in the absence of any charge of fraud to substitute the judgment of the present incumbent of the office in disregard to the final judgment of his predecessor in office, and in destruction of the rights of the grantee claimant.

4. In failing to find and hold that the order of the Commissioner of the General Land Office, approved by the Secretary of the Interior, herein complained of, directing a further survey of this grant and with directions for the destruction of the monuments of the survey made under the order of the Secretary of the Interior, given more than eleven years prior thereto, is ultra vires and void.

5. In failing to find and hold that the only possible effect of the order herein complained of for a new survey of this grant is to change or amend the patent given on said grant, as the patent must follow and be limited by the survey on which it was issued, the calls of which as finally established by the monuments on the

ground under the prior final order of the Secretary of the Interior are proposed to be changed thereby.

6. In holding that the Secretary of the Interior is not
22 undertaking in any way to change or amend the patent originally granted, but merely endeavoring to ascertain its boundaries.

7. In discharging the rule to show cause, and in granting defendant's motion to dismiss plaintiff's bill filed for the purpose of restraining the defendant from carrying into effect his arbitrary and unwarranted order for a further survey of the plaintiff's grant with destruction of the monuments established under the prior final order of the Secretary of the Interior.

8. In failing to grant to the plaintiff relief as prayed for against the unlawful and arbitrary act of the defendant in attempted diminution of the plaintiff's grant.

9. In failing to grant the injunction prayed for by the appellants and in dismissing their bill of complaint.

10. Other errors appearing on the face of the record herein.

ALEXANDER BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for Appellant.

Service of copy of the above assignments of error acknowledged this 27- day of July, 1916.

C. EDWARD WRIGHT.
P. S. B.

Designation of record.

Filed July 27, 1916.

* * * * * * *

To John R. Young, Esq., Clerk, Supreme Court, D. C.

DEAR SIR: On behalf of the above Joseph J. Darlington et al., plaintiffs and appellants, we request that you will cause to be prepared the transcript of record on appeal in the above-entitled cause; and we hereby designate the following to be included in said transcript:

1. Bill of complaint, and all exhibits attached thereto.
2. Rule to show cause.
3. Return of defendants to rule to show cause.
4. Motion of defendants to dismiss the bill of complaint.
5. Opinion of court.
6. Decree discharging rule to show cause, and dismissing the bill of complaint, including endorsement thereon of appeal in open court and order fixing amount of appeal bond for costs.
7. Assignments of error.

8. Memorandum of approval and filing of bond for costs on appeal.
9. This designation.

ALEXANDER BRITTON,
EVANS BROWNE,
F. W. CLEMENTS,
Attorneys for said Appellants.

23 Service of copy of above designation acknowledged, this 27- day of July, 1916.

C. EDWARD WRIGHT,
Attorney for Defendants.
P. S. B.

Memorandum.

July 31, 1916.—Bond on appeal for $100 approved and filed.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 44, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 33,205 in Equity, wherein Joseph J. Darlington and John H. Clapp, trustees of the estate of John M. Clapp, deceased, are plaintiffs, and Franklin K. Lane, Secretary of the Interior, is defendant, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said district, this 25th day of August, 1916.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*
By W. E. WILLIAMS,
Assistant Clerk.

(Endorsed on cover:) District of Columbia Supreme Court. No. 3014, Joseph J. Darlington et al., appellants, vs. Franklin K. Lane, etc. Court of Appeals, District of Columbia. Filed Sep. 8, 1916. Henry W. Hodges, clerk.

24 TUESDAY, *April 3rd, A. D. 1917.*

* * * * * * *

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, TRUSTEES, estate of John M. Clapp, deceased, appellants, *vs.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. } No. 3014.

The argument in the above-entitled cause was commenced by Mr. F. W. Clements, attorney for the appellants, and was continued by Mr. C. E. Wright, attorney for the appellee, and was concluded by Mr. F. W. Clements, attorney for the appellants.

25 In the Court of Appeals of the District of Columbia.

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, TRUSTEES, estate of John M. Clapp, deceased, appellants, *vs.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. No. 3014.

Opinion.

(Mr. Justice Van Orsdel delivered the opinion of the court.)

Appellants filed a bill in equity in the Supreme Court of the District of Columbia to restrain defendant, Secretary of the Interior of the United States, from interfering with the boundaries by resurvey of a Mexican land grant which had been patented to one White, through whom the plaintiffs claim by mesne conveyances.

It appears that the claim of White to the land in question was confirmed by the commission appointed by authority of an act of Congress (9 Stats. L., 631) to adjust Mexican land claims in California. The order of confirmation is as follows: "In this case, on hearing the proofs and allegations, it is adjudged by the commission that the claim of the petitioner is valid, and it is therefore decreed that his application for a confirmation be allowed, with the following boundaries, to wit: On north and east by the foot of the mountain, on the south by the Agua Caliente, and on the west by the cotton woods, which are on the other side of the creek, reference being had to the map accompanying the expediente." A survey of the lands was made by one Hancock in 1868, which was finally approved by the Secretary of the Interior, and a patent issued thereon on June 22, 1872. In 1885 a bill was filed by the United States to set aside the patent on the ground that the approval of the Hancock survey had been procured by fraud and misrepresentation. The case finally reached the Supreme Court of the United States (United States vs. Hancock, 133 U. S., 193), but the court refused to sustain the allegations of fraud and ordered the bill dismissed.

26 The grant was very irregular in shape, there being in the Hancock survey forty-nine calls or stations. In 1885 a survey of the surrounding Government land was undertaken, and accordingly a resurvey of the patented grant was made by one Perrin, which he retraced in 1896. Perrin reported the marks established by Hancock in place, except the marks between stations 20 and 25. The important discrepancy was between stations 20 and 21. Hancock's line from station 20 to station 21 was in distance thirty chains, station 21 being designated by a sycamore tree. Perrin in 1885 found a burnt sycamore tree at thirty and fifteen hundredths chains. In 1896 he reported that he found no mark, but at twenty chains found a blazed sycamore tree. He found, however, that by following the courses and distance of Hancock from the sycamore tree so found, he could not reach station 25, but was forced to make an arbitrary closing of the lines at that point. Protest was made by the owners against this survey since by establishing station 21 at twenty chains according to Perrin's survey, instead of at thirty chains according to Hancock's survey and as set forth by courses and distances in the patent, it excluded about three hundred acres from the grant.

The Commissioner of the General Land Office vacated his approval of the Perrin survey, and one Owen, a special examiner, was instructed by the department to examine into the survey between stations 20 and 25. In 1902 Owen reported, in effect, that from marks or topography of the country he found a condition difficult to unravel. He said: "The question of determining the foot of the mountain is an intensely difficult one and is purely a matter of judgment, and construction of the definition of that phrase." Owen, however, reported that at thirty chains from station 20 in the direction indicated in the Hancock survey he found a burnt sycamore stump. On this report the Secretary under date of October 30, 1902, rendered a decision reviewing the entire history of the case, and directed the Commissioner of the General Land Office to cause a survey of the
27 grant to be made between stations 20 and 25, instructing him that "if any natural or artificial object indicating or marking Hancock's line of survey can be found they must necessarily control and all parties in interest should be afforded an opportunity to establish such monuments if they can be found; but if they cannot be identified as Hancock's original corners or stations by some ascertained monument or object the line of survey must be established by the course and distance given in the patent but closing upon station 25, irrespective of course and distance."

In accordance with these instructions one Sickler, a deputy surveyor, made a survey which established and marked the line according to the calls of the Hancock survey and as called for by courses and distances in the patent requiring, however, an arbitrary closing at station 25. This survey was approved by the Secretary February 28, 1907. With this final establishment of the line in conformity with the terms of the patent the adjoining public lands were surveyed and

platted, which surveys were approved by the Secretary and the lands disposed of in accordance therewith.

This disposition of the dispute seemed to have settled the whole matter until the Secretary, on September 5, 1913, assumed jurisdiction of the matter and directed that the order approving the Sickler survey be vacated and that the line be reestablished and marked according to the Perrin survey as returned in 1896 and rejected in 1902, and that "the settlers in the territory involved be permitted to amend their entries to include the area taken from them by the erroneous approval of the Sickler survey." Plaintiffs petitioned the Secretary to revoke this order, which was denied on December 16, 1914; hence this action to restrain him from carrying the order into effect.

Defendant moved to dismiss the bill, admitting that the title of plaintiffs rests upon the patent of 1872 describing the land demarcated by the Hancock survey, but averring that all subsequent surveys have been for the purpose merely of ascertaining and locating on the ground the lines of the Hancock survey; that the
28 duty of ascertaining and determining this matter devolves by law upon the Secretary of the Interior and is, therefore, within his discretion and not subject to control in this action, and that the object is to establish the Hancock survey and not alter the lines as actually patented.

On hearing the court below sustained the motion and dismissed the bill. From the decree this appeal was taken.

The Secretary, in ordering the Sickler survey to reestablish and monument the lines of the Hancock survey according to the courses and distances called for in the patent, adopted the only legal course open to adjust the confused situation. The rule of law applicable in cases of disputed boundaries is concisely stated in the decision of the Secretary directing the Sickler survey, as follows: "Those rules and the order in which they are usually considered are: First, natural boundaries; second, artificial marks; third, adjacent boundaries; and fourth, course and distance. These rules, however, are not inflexible as, where the location of monuments and objects called for are involved in doubt and obscurity and can not be ascertained with any reasonable degree of certainty and where no mistake can reasonably be supposed in course and distance. The controlling principle in the location of boundaries being that what is most material and certain in a description must prevail over that which is less certain. Tyler on Boundares (30); Newsom vs. Pryor's Lessees (7 Wheat., 7). But where natural or artficial objects are wanting, course and distance must govern in the absence of a more certain call. 'If a grant be made which describes the land granted by course and distance only or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us and must be used.' Chinoweth vs. Haskell's Lessees (3 Pet., 192)."

But the order before us is not to make further endeavor to establish the correct Hancock line, but to arbitrarily set aside the order
29 confirming the Sickler survey and to substitute the Perrin line. Of the Perrin survey the Secretary, in his decision, elicited by the Owen report, said: "It does not appear from the returns of the Perrin survey of 1896 or from any of the reports of the examination thereof that 'M 21' of Hancock's survey has been identified sufficiently to warrant the termination of the line at 20 chains. The mere fact that Perrin found a blazed sycamore there having no distinguishing mark from other trees of the same kind furnishes no proof that it is the original tree designated by Hancock as 'M 21,' especially when found by such utter disregard of distance and to a certain extent out of course. The rule that monuments will not invariably control where they are involved in doubt and obscurity and where no mistake can reasonably be supposed in course and distance, applies with great force in this case where the supposed monument contains no evidence of the identity of the original monument and where it cannot be reasonably supposed that such excessive error in distance could have occurred. In his survey of 1885 Perrin at 30.15 chains found a burned sycamore stump which he reported he was unable to determine whether it was station 21, as there were several burned sycamore stumps in the vicinity. He, however, accepted it as 'M 21' and it certainly gratified the call better than the sycamore found at 20 chains, being corroborated by course and distance. In his survey of 1896 he reports that at 30 chains he found no trace of a sycamore tree or evidence of there having been a tree at that point, and therefore determined that the sycamore at 20 chains is the corner which he marked 'M 21.' Examiner Owen, however, found the burned sycamore stump at 30 chains, which is evidently the stump found and reported by Perrin in 1885."

Of the probable correctness of the Hancock survey the court, in United States vs. Hancock, supra, said: "Some question is made as to the correctness of the survey, and that turns as a question of fact upon what is meant by the expression 'Agua Caliente' in the various descriptions. If it means a stream known as Agua Caliente,
30 then the Government has no cause to challenge the survey, for it includes less than was really confirmed, but if it means a district of country known by that name in the northwestern portion of the San Bernardino Rancho, a neighboring tract, then the survey was excessive. If it were necessary for us to determine this question we think the evidence in the case indicates that the stream and not the district was intended, but it is not the province of this court to correct a mere matter of survey like that. If made in good faith and unchallenged as this has been for over fifteen years, whatever doubts may exist as to its correctness must be resolved in favor of the title as patented."

We have, perhaps, dwelt at undue length on the survey and the legal authority of the Secretary to settle it according to the courses

and distances called for in the patent. If that were the only question before us, and it were still an open question in the department, it is elementary that we would be without jurisdiction to control the discretion of defendant and order which of the several surveys should be adopted. "The courts can neither correct nor make surveys. The power to do so is reposed in the the political department of the Government, and the Land Department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction can not be questioned by the courts before it has taken final action." Kerwan vs. Murphy, 189 U. S., 35, 54.

But the crucial question here presented goes to the jurisdiction of defendant Secretary to reopen this case. The order for the remonumenting of the Hancock survey extended an invitation to all persons in interest to be heard, including those who had settles upon or initiated claims to surrounding lands. By this action the boundaries of the patented claim became fixed as the established line of demarcation between it and the surrounding public domain. With the approval of the Sickler survey, made in accordance therewith, we think the jurisdiction of the Secretary ended. The contention
31 now that the carrying into effect of the present order would not affect the title of plaintiffs is fallacious, for two reasons—(1) because it would cast a cloud upon their title, which would, at least, require a proceeding in court to remove, and (2), if acquiesced in, it would reduce the area of the patented grant by three hundred acres.

Much reliance is placed by counsel for the Government upon the case of Kerwan vs. Murphy, supra. There a claim had been patented based upon a survey which described the meander line of a lake as one of the boundaries. It was afterwards discovered that, between the meander line shown by the patent and the actual shore of the lake, there were about twelve hundred acres of unsurveyed land. The Government undertook to survey this land as Government land, and injunction was sought by the grantee to restrain the survey, on the ground that his claim extended to the lake. Of course, the court held that the Land Department could not be restrained from investigating whether or not there was Government land between the line defined in the patent and the lake. So here the department was well within its rights in ascertaining the boundary between the patented land and the Government domain. But when that had been accomplished and the matter had been closed by final order of the Secretary the jurisdiction of the officials of the Government ceased. Indeed, the distinction is clearly pointed out by the court in the Kerwan decision, as follows: "Noble vs. Union River Logging Co., 147 U. S., 165, is not to the contrary, for that was a case where the executive department had confessedly finally acted and then attempted to resume jurisdiction, and an injunction was sustained."

The rule is uniform that, when patent passes from the Government, the legal title passes with it, and all supervision or control over the land patented ceases in the officials of the Government. In Brown vs. Hitchcock, 173 U. S., 473, cited by counsel for defendant, as in many of the cases cited, the title had not passed by patent, and the court approved the rule announced in United States vs.
32 Schurz, 102 U. S., 378, 396, as follows: "Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were yet in fieri, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere. But we have also held that when, by the action of these officers and of the President of the United States, in issuing a patent to a citizen, the title to the lands has passed from the Government, the question as to the real ownership of them is open in the proper courts to all the considerations appropriate to the case."

The land embraced within the grant was never a part of the public domain of the United States. The rights of the grantee were preserved by the stipulations of the treaty with Mexico. When the extent of his rights were finally ascertained and confirmed by the special tribunal commissioned by Congress for that purpose, nothing remained for the Land Department but to survey the lines and issue a patent. With the approval of the survey and the issue of the patent, the whole matter passed beyond the control of the department. For fraud practiced, either in making the survey or procuring the patent, the matter was still beyond the jurisdiction of the department, but subject to a proceeding in court to annul the patent, as was attempted in the Hancock case.

It may be stated broadly, therefore, that the jurisdiction of the officials of the Land Department over public lands passes with the delivery of a patent therefor. In Moore vs. Robbins, 96 U. S., 530, 533, it was said directly that it was a part of the daily business of the officers of the Land Department "to decide when a party has by purchase, by preemption, or by any other recognized mode, established a right to receive from the Government a title to any part of the public domain. This decision is subject to an appeal
33 to the Secretary, if taken in time. But if no such appeal be taken, and the patent issued under the seal of the United States and signed by the President is delivered to and accepted by the party, the title of the Government passes with this delivery. With the title passes away all authority or control of the Executive Department over the land and over the title which it has conveyed. * * * The functions of that department necessarily cease when the title has passed from the Government."

It logically follows that with the approval of the Hancock survey and the issue of the patent conveying to the grantee the lands therein

described, the jurisdiction of the Land Department ceased. The right of the department later to locate the line for the purpose of establishing boundaries of adjacent public lands was limited to the Hancock survey. As we have observed, and as the law required, if the station marks of the Hancock survey could not be found, it was the duty of the department, as was done by the Sickler survey, to establish the monuments by courses and distances as defined by Hancock and called for in the patent.

The approval of the Sickler survey was an official determination of the whole matter. For years this was accepted and the adjacent public lands were settled upon and disposed of on that basis. After the patent had been outstanding for over forty years, and the re-establishment of the original survey had been approved for many years, the present order was made. We think it is beyond the jurisdiction of the Secretary to thus revoke the order of his predecessor finally determining outstanding vested rights. "One officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court." United States vs. Stone, 2 Wall., 525, 535. Or, as was said by Mr. Justice Miller in United States vs. Schurz, supra: "From the very nature of the functions performed by these officers, and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter
34 ceases. It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away."

An order of the Secretary of the Interior, revoking the order of his predecessor reestablishing and monumenting the boundary of plaintiffs' grant in accordance with the description in the patent, and arbitrarily substituting a survey considered and condemned by his predecessor, thereby greatly reducing the area of plaintiffs' patented grant, is an exercise of power equivalent to the revoking of a patent. It would amount to divesting plaintiffs of their property without due process of law, since a patent can only be annuled or cancelled by a court. Any attempt to thus interfere with rights so vested may be enjoined. In New Orleans vs. Paine, 147 U. S., 261, 264, the court, referring to Noble vs. Union River Logging Railroad, supra, in connection with the question it then had under consideration, said: "In that case it appeared that the only remedy of the plaintiff was to enjoin the Secretary of the Interior from revoking his approval of a certain map, which operated as a grant of land. His contemplated action amounted in effect to the cancelation of a land patent. So, in this case, if it were made to appear that the former survey had been completed and approved in such manner that all the lands included within the lines of the former survey

had become vested in the plaintiff, it is possible that it might be entitled to an injunction against any act which would have the effect of disturbing or unsettling a title thereby acquired."

The grantee and his successors have been in undisturbed possession of the patented area for over forty years. Considering a similar situation, involving the power of the Secretary of the Interior, by an order made in 1861, to challenge a survey of the south line of
35 the Fort Leavenworth Military Reservation made and approved in 1830, the court, in United States vs. Stone, supra, said: "It was made in the year 1830, and since that time both parties have held possession and claimed up to the lines then established by the survey. In the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case."

This is the only principle upon which the security of title can rest. If power rests in the Secretary of the Interior to cancel the orders of his predecessors finally determining property rights simply because he differs from them in opinion, there would be no such thing as a vested title derived from the Government. If an order can be revoked forty years after issue of patent, and ten years after final reestablishment of the lines of the patented grant, it can be done after the lapse of a hundred years. Upon the finality of proceedings in the Land Department depends the security of titles emanating from the Government. The present order, if carried into effect, would impair the title of plaintiffs as vested by the terms of the patent. It is, therefore, beyond the jurisdiction of the Secretary, and a restraining order should issue.

It follows that there can be no question of the jurisdiction of the court to restrain the Secretary from carrying the order complained of into effect. It would deplete the acreage of land patented by the Government and impair the vested rights of plaintiffs. The United States is not a party in interest, since the survey in question merely defines the boundary line of lands to which title never vested in the United States, except as trustee for the Mexican grantee, and to which, in confirmation of the trust, a patent had long since issued.

The threatened action of the Secretary is ultra vires. Dis-
36 cretionary power cannot be invoked, since there is no fact or question within his jurisdiction to be investigated or determined. In such cases it has been held repeatedly by the courts that injunction is the appropriate remedy. If an officer of the Government is without lawful power or jurisdiction to do the thing complained of, he may be enjoined with the same propriety as by mandamus he can be compelled to perform a duty imposed upon him by law.

The decree is reversed with costs, and the cause is remanded with directions to enter a decree restraining the defendant, Secretary of the Interior, from proceeding to carry the order complained of into effect.

Reversed and remanded.

37 FRIDAY, *June 1st, A. D. 1917.*

* * * * * * *

JOSEPH J. DARLINGTON AND JOHN H. Clapp, trustees estate of John M. Clapp, deceased, appellants, *vs.* FRANKLIN K. LANE, SECRETARY OF THE Interior. } No. 3014. April term, 1917.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said Supreme Court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said Supreme Court with directions to enter a decree restraining the defendant, Secretary of the Interior, from proceeding to carry out the order complained of into effect.

Per Mr. Justice VAN ORSDEL,
June 1, 1917.

38 In the Court of Appeals of the District of Columbia.
April term, 1917.

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, TRUSTEES OF the estate of John M. Clapp, deceased, appellants, *vs.* FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. } No. 3014.

Petition for allowance of appeal.

Comes now Franklin K. Lane, Secretary of the Interior, and shows that on or about the 1st day of June, 1917, this court entered a judgment herein in favor of the appellants and against the appellee, reversing a decree of the Supreme Court of the District of Columbia in favor of the appellee; in which judgment of this court certain errors were committed to the prejudice of the appellee, all of which will appear more in detail from the assignment of errors filed with this petition.

The appellee further shows that said judgment of this court is subject to review by the Supreme Court of the United States under the

provisions of the fifth paragraph of section 250 of the Judicial Code, in that the validity of an authority exercised under the United States and the existence and scope of a power or duty of the appellee, he being an officer of the United States, are drawn in question.

Wherefore, he prays the allowance of an appeal removing this case to the Supreme Court of the United States for the correction of the errors complained of; that a transcript of the record, proceedings, and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States; and that the mandate of
39 this court may be stayed until further order.

FRANKLIN K. LANE,
Secretary of the Interior.

By his attorneys:

CHARLES D. MAHAFFIE,
Solicitor.
C. EDWARD WRIGHT,
Assistant Attorney.

40 In the Court of Appeals of the District of Columbia.

April term, 1917.

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, TRUSTEES OF the estate of John M. Clapp, deceased, appellants.
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. } No. 3014.

Assignment of errors.

Comes now the appellee by his attorneys and says that in the record and proceedings of the Court of Appeals in the above-entitled cause and in the rendition of final judgment thereon, manifest error has intervened to the prejudice of the appellee, in this, to wit:

1. That the court erred in reversing the decree of the Supreme Court of the District of Columbia in favor of the appellee and against the appellants and in remanding the cause for a decree enjoining the appellee as prayed in the petition.

2. That the court erred in not affirming the decree of the Supreme Court of the District of Columbia.

3. That the court erred in failing to hold that the Secretary of the Interior was merely and duly attempting to ascertain and delimit the public lands of the United States from the lands owned by the appellants, and that he has authority and that it is his duty to ascertain and determine what are public lands of the United States and where their boundaries may be.

4. That the court erred in failing to hold that a survey or resurvey or retracement of the lines of a survey involving the boundaries of public lands in the United States, each and all, are matters exclu-

sively within the jurisdiction of the Secretary of the Interior to make or to determine or to establish.

41 5. That the court erred in not affirming the decree of the lower court on the ground, if, on no other ground, that the appellants' bill of complaint fails to allege or to show that the amount of land patented to them by the United States will be diminished by the action sought to be enjoined.

6. That the court erred in ordering a final decree against the Secretary of the Interior without affording him opportunity to make answer to the appellants' bill and to dispute certain statements of facts therein.

7. That the court erred in holding that the United States is not an interested party, entitled to be heard on the question as to where the land of the appellants ends and the public land of the United States begins.

Wherefore the appellee prays that for the errors aforesaid and other errors appearing in the record the judgment of said Court of Appeals may be reversed, annulled, and for naught esteemed, and that said cause may be remanded to said Court of Appeals with instructions to affirm the decree of the Supreme Court of the District of Columbia in said suit rendered, or for such further proceedings as may be determined, to the end that justice may be done in the premises.

FRANKLIN K. LANE,
Secretary of the Interior.

By his attorneys:

CHARLES D. MAHAFFIE,
Solicitor.

C. EDWARD WRIGHT,
Assistant Attorney.

(Endorsed:) No. 3014. J. J. Darlington et al. v. Franklin K. Lane, Secretary of the Interior. Petition for allowance of appeal and assignment of errors. Court of Appeals, District of Columbia. Filed June 2, 1917. Henry W. Hodges, clerk.

42 SATURDAY, *June 2nd, A. D. 1917.*

* * * * * * *

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, TRUSTEES, estate of John M. Clapp, deceased, appellants,
vs.
FRANKLIN K. LANE, SECRETARY OF THE INTERIOR. } No. 3014.

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States and to stay the mandate until further order, in the above-entitled cause, it is by the court this day ordered that said petition be and the same is hereby granted.

43 UNITED STATES OF AMERICA, *ss:*

To Joseph J. Darlington and John H. Clapp, trustees, estate of John M. Clapp, deceased, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Franklin K. Lane, Secretary of the Interior, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chas. H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 4th day of June, in the year of our Lord one thousand nine hundred and seventeen.

CHAS. H. ROBB,
Associate Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this 4th day of June, 1917.
ALEX. BRITTON,
Counsel for Jos. J. Darlington et al., Trustees.

44 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 43, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Joseph J. Darlington and John H. Clapp, trustees estate of John M. Clapp, deceased, appellants, vs. Franklin K. Lane, Secretary of the Interior, No. 3014, April term, 1917, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 6th day of June, A. D. 1917.

[SEAL.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

(Indorsed:) Office of the clerk, Supreme Court U. S. Received July 1, 1917.

(Indorsement on cover:) File No. 26025, District of Columbia, Court of Appeals. Term No. 558. Franklin K. Lane, Secretary of the Interior, appellant, vs. Joseph J. Darlington and John H. Clapp, trustees estate of John M. Clapp, deceased. Filed July 2, 1917. File No. 26025.

○

INDEX.

CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, appellant,
v.
JOSEPH J. DARLINGTON AND JOHN H. CLAPP, Trustees, Estate of John M. Clapp, deceased. } No. 219.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLANT.

STATEMENT OF THE CASE.

This appeal brings up for review a decree of the Court of Appeals of the District of Columbia reversing a decree of the Supreme Court of the District and remanding the cause to that court with directions to enter a decree restraining the Secretary of the Interior from executing an order of September 5, 1913, directing the reestablishment and appropriate marking of the boundaries of the public lands according to the Perrin retracement of the survey of the Muscupiabe grant, and permitting the settlers in the public territory involved to amend their

entries so as to include the area erroneously included as a part of the Muscupiabe grant in the Sickler survey (R. 24–32).

THE PLEADINGS.

Darlington and Clapp, trustees of the estate of John M. Clapp, deceased, owner of the grant, filed their bill of complaint against the Secretary of the Interior, alleging that the Muscupiabe grant was confirmed to one White in 1855, the survey thereof, made by one Hancock, being approved June 21, 1872, in accordance with which patent issued (R. 1–2, 13); that subsequently a bill was filed on behalf of the United States to set aside this patent but that the same was sustained in *United States* v. *Hancock*, 133 U. S. 193; that plaintiffs claim title under this patent, thus sustained by the decision of the Supreme Court of the United States (R. 2); that some question was raised in the late nineties as to the proper marking of the northern boundaries of the grant, and the Land Department entered into contract with one Perrin, a surveyor, to re-establish the same; that the grant is irregular in form, showing forty-nine stations in the boundary, and in the Perrin survey the original monuments were found and re-established except between stations twenty and twenty-five; that between these two stations the survey was protested by the owner of the grant, upon consideration of which the Secretary of the Interior, on October 30, 1902, refused to approve the Perrin survey and laid down the rule under which a proper

survey was to be made; that in accordance with these directions the survey commonly known as the Sickler survey was made, and approved by the Commissioner of the General Land Office May 19, 1906, and by the Secretary of the Interior February 28, 1907; that notwithstanding the foregoing facts the defendant Secretary of the Interior had assumed jurisdiction of the matter of the reestablishment of the boundaries of this grant as patented, and had rejected and held for naught the previously approved Sickler survey, and directed the Commissioner of the General Land Office to take appropriate steps to reestablish and appropriately mark the Perrin lines previously rejected (R. 2); that the result of this order, if carried into effect, will be the destruction of the markings of the approved Sickler survey, the casting of a cloud upon the plaintiff's title to the land between the two surveys, and the institution of numerous suits to the irreparable injury of the plaintiffs. That the plaintiffs are without adequate remedy at law (R. 2–4).

Copies of the departmental decisions of October 30, 1902, and September 5, 1913, are filed as exhibits with the bill, and the prayer is for an injunction to restrain the Secretary "from further proceeding under his said order of September 5, 1913, in attempted resurvey of your orator's grant" (R. 3, 4, 5–18).

The Secretary of the Interior filed a motion to dismiss the bill (R. 19) upon the following grounds:

1. The want of jurisdiction in equity because (*a*) title to the grant rested upon the patent under the

Hancock survey and not upon the Sickler survey; (*b*) that the Perrin and Sickler surveys were mere surveys to ascertain and locate on the ground the lines of the Hancock survey, in order to determine where the line of the public domain ends and that of the grant begins, and neither could change, nor did they attempt to correct, the Hancock survey; (*c*) that the duty of determining what are public lands subject to disposal under the public-land laws of the United States rests upon the Secretary; (*d*) that the authority for making, correcting, and retracing of public surveys is exclusively within the jurisdiction of the Secretary; (*e*) that the bill shows that the Secretary is merely endeavoring to ascertain where the lines of the grant lie on the ground and not to resurvey said grant nor to alter the lines of the lands as patented.

2. That this action of the Secretary was within his jurisdiction and discretion and can not be controlled by injunction.

3. That this is in effect a suit against the United States and is not authorized by law.

The Supreme Court of the District sustained the motion and dismissed the bill (R. 20).

The Court of Appeals reversed this judgment and ordered the entry of a final decree restraining the defendant as prayed (R. 24–32).

THE FACTS.

The Muscupiabe grant, according to the bill and exhibits, is a Mexican grant in California, confirmed in 1855. The grant was surveyed by Hancock in

1867. This survey was finally approved June 21, 1872, and on June 22, 1872, patent issued in accordance therewith. The validity of this location was sustained in *United States* v. *Hancock*, 133 U. S. 193 (R. 2, 13).

Since the Hancock survey there have been two attempts by the Land Department to relocate the north boundaries of the grant. These surveys are known as the Perrin and Sickler surveys. The Perrin survey was completed in 1896, and approved by the General Land Office October 30, 1901, "after having been suspended for many years and subjected to close scrutiny, and mature consideration" (R. 14). A protest was filed by the owner of the grant against the Perrin survey "between stations twenty and twenty-five." An examiner was appointed to make an examination of the survey and report his findings. After consideration of the report of this examiner the General Land Office declined to revoke its approval of the Perrin survey, but the then Secretary of the Interior, on October 30, 1902, reversed the decision of the General Land Office with instructions to relocate the stations between twenty and twenty-five (R. 5–13). Under these instructions the Sickler survey was then made, and was approved by the General Land Office May 19, 1906, and by the Department February 28, 1907 (R. 3). Upon protests filed in the General Land Office against this decision by Lafayette Mehham and C. L. Cate (R. 13), the First Assistant Secretary on September 5, 1913, saying that certain affidavits, together with the physical facts referred to

by Perrin in his field notes and by the examiners who inspected the works, "go far toward convincing the department that Perrin's survey was, substantially, a relocation of the Hancock survey" (R. 16), vacated the approval of the Sickler survey and adopted the line established by Perrin between stations twenty and twenty-five as the boundary of this grant, and directed the Commissioner of the General Land Office to take appropriate steps to re-establish and appropriately mark Perrin's line and the lines of the public lands affected thereby and permit the settlers to amend their entries to include the areas between the Perrin and Sickler surveys (R. 17, 18). A motion for rehearing of this departmental decision was filed by the grant claimants and was denied, the First Assistant Secretary saying (R. 18):

> The Hancock survey is the one which governs the limits of the grant, and the effort has been to properly reestablish the lines of that survey. The department is convinced that the Perrin lines more accurately delineate the original survey than does the later survey made by Sickler. The Perrin survey should not have been disturbed. The present purpose of the department is to correct the error which was made when that survey was set aside and the Sickler survey substituted therefor.

It is the execution of this departmental decision of September 5, 1913, which is directed by the Court of Appeals to be enjoined.

PROPOSITIONS.

To support the contention that the Court of Appeals erred in reversing the decree of the Supreme Court of the District, we present the following propositions covered by the assignment of errors (R. 33):

1. This suit is in effect one against the United States in whose behalf title is asserted to the land lying between the Sickler and Perrin surveys, and the courts are without jurisdiction because the United States has not consented to be sued or waived its immunity from suit.

2. The bill does not allege any grounds for the jurisdiction of equity; there is a want of jurisdiction to interfere with the executive administration, and an absence of indispensable parties.

3. In any event, the decree of the Court of Appeals is erroneous in directing an injunction to issue without an opportunity for the defendant Secretary to answer and set up the facts.

ARGUMENT.

I.

This suit is in effect against the United States and the courts are without jurisdiction because the United States has not consented to be sued or waived its immunity from suit.

The injunction prayed for in the bill of complaint and awarded by the Court of Appeals will affect no pecuniary interest of the Secretary but would bind the United States and determine its title to the 300 acres of land lying between the Perrin and Sickler

surveys, title to which is asserted on behalf of the United States by the Secretary. This suit is therefore in substance and effect against the United States. The United States has not consented to be sued or waived its immunity from suit, and there is a want of jurisdiction to grant the relief prayed. *Oregon* v. *Hitchcock*, 202 U. S. 60, 68; *Louisiana* v. *Garfield*, 211 U. S. 70, 77; *New Mexico* v. *Lane*, 243 U. S. 52. The considerations involved in this proposition are absolutely coincident with those required to be taken into view in order to determine the power of the Secretary. *Lane* v. *Mickadiet*, 241 U. S. 201, 210.

In *Oregon* v. *Hitchcock* the State of Oregon, asserting title under the Swamp Land Act, sought to restrain the officers of the Land Department from allotting and patenting swamp land on an Indian reservation. The bill was dismissed, and the Court, by Mr. Justice Brewer, said (p. 68):

> * * * While the nominal defendants are citizens of a State other than Oregon, yet they have no interest whatever in the controversy, and if a decree be rendered against them in favor of the State it will not affect their interests but bind and determine the rights of the United States, the real, substantial defendant.

In *Louisiana* v. *Garfield* a military reservation established in 1838 was abandoned in 1871. In 1895 the Secretary of the Interior approved a list of swamp lands presented by the State. In 1904 the Secretary ordered the approval of 1895 vacated

and the lands held for disposition by the Department on the ground that they were excepted from the grant because at that time embraced within a military reservation. An injunction was sought to prevent the Secretary from carrying out this order. Mr. Justice Holmes said (p. 75):

> We will assume for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit.

Upon the question of the existence of doubt as to the title of the State the Court said (p. 77):

> But that doubt can not be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. The United States fairly might argue that the statute of limitations was confined to patents, or was excluded by the act of 1871. If it yielded those points it still reasonably might maintain that a title could not be acquired under the statute by a mere void approval on paper, if the United States ever since had been in possession claiming title, as it claimed it earlier by the act of 1871. It might argue that, for equitable relief on the ground of title in the plaintiff, in the teeth of the last-named act, it would be necessary at least to allege that the State took and has held possession under the void grant. The United States might and undoubtedly would deny the fact of such possession, and that fact can not be tried behind

its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit.

In *New Mexico* v. *Lane* the State of New Mexico asserted title to the 16th section under a school grant of June 21, 1898, and sought to enjoin the Secretary and the Commissioner from issuing patent to one Keepers who had made application under the coal land law. The school grant excepted mineral land, and the question was whether at the date of the grant the land was known coal land. The bill showed that the State had contested Keepers' application in the Land Department on the ground that the decision awarding the land to the applicant did not find the known coal character of the land at the date of the granting act, and the facts under the law as then construed and interpreted would not have rendered the land known coal land. There was a motion to dismiss on the ground that the United States was a real party in interest, for if the injunction should issue it "would be deprived of the purchase price of the land." The motion was sustained upon the authority of *Louisiana* v. *Garfield*, the Court saying that there were questions of law and fact upon which the United States was entitled to be heard. It was further held (p. 58) that "Keepers is an indispensable party, he having become, according to the bill, a purchaser of the land and paid the purchase price thereof."

II.

Equity has no jurisdiction to interfere with the executive administration. There is also an absence of indispensable parties.

Equity jurisdiction is attempted to be invoked by the bill on the ground that the execution of the departmental order would (1) destroy the markings of the Sickler survey, (2) cast a cloud upon the title to the land between the Perrin and Sickler surveys, (3) and would cause the institution of innumerable suits at law to the irreparable injury of the plaintiffs. We will examine these alleged grounds of equity jurisdiction in their order.

1. The Sickler survey.

The allegation of the bill is that the execution of the departmental order will destroy the markings of the Sickler survey. It does not follow that the adoption of the Perrin survey by the Secretary of the Interior and retracing the lines on the ground will destroy the markings of the Sickler survey, and the executive order of the Secretary does not direct the destruction of the markings of the latter survey. Aside from this, the plaintiffs' title does not vest either by reason of the Sickler survey or its approval by the Secretary. "A survey does not create title; it only defines boundaries" (*Russell* v. *Maxwell Land Grant Company*, 158 U. S. 253, 259); and the destruction of the markings of the Sickler survey will not affect the title of the plaintiffs to the grant as patented in accordance with the Hancock survey. There is

no attempt on the part of the Secretary to correct the Hancock survey, in accordance with which the plaintiffs' title vests, and the plaintiffs are not seeking to restrain the correction of that survey but of the Sickler survey, which is not a part of their muniment of title. An injunction is unnecessary to restrain the destruction of the markings of the Sickler survey unless it is shown that destruction of these markings is contemplated, but in no event will it lie when such monuments are not part of the muniment of the plaintiffs' title. Such injunction should not in any event restrain the remarking of the Hancock survey on the lines of the Perrin survey, but only the destruction of any markings of the Sickler survey.

2. Casting a cloud upon the plaintiffs' title.

It is again asserted that a survey does not create title, and the retracing of the Perrin line, already monumented on the ground, casts no cloud upon the plaintiffs' title, if any they have, to the land lying between the Sickler line and the Perrin line. The Hancock line governs the limits of the plaintiffs' grant, and whether or not the 300 acres of land lying between the Perrin line and the Sickler line fall on the north side of the Hancock line and are thus part of the public domain, or on the south side of that line and are therefore a part of the Muscupiabe grant, is a question of fact which may be inquired into in a proper case by the courts in whose jurisdiction the land lies. The language of Mr. Justice Brewer in

Russell v. *Maxwell Land Grant Company*, 158 U. S. 253, 259, is pertinent:

> * * * Whether a survey as originally made is correct or not is one thing, and that, as we have seen, is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction otherwise than by original proceedings in equity. While on the other hand, where the lines run by such survey lie on the ground, and whether any particular tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts.

The Court of Appeals fell into manifest error in treating the approval of the Sickler survey as "finally determining outstanding vested rights" (R. 30). The vested rights of the owner of the Muscupiabe grant were finally determined by the patent and Hancock survey. Concededly, the Land Department has no authority after a patent has been issued in accordance with the Hancock survey to affect rights established thereby (*Cragin* v. *Powell*, 128 U. S. 691); but the Land Department necessarily has the right to determine what are public lands, and it is charged with the duty of asserting title thereto. In this case it is the duty of the Land Department to determine whether the lands lying between the Sickler survey and the Perrin survey are public lands, and jurisdiction to determine that fact is not lost until this land is actually patented. *Cragin* v. *Powell*, *supra*. The Secretary of the Interior who approved the Sickler survey had no authority to grant, and did not grant,

by approving that survey, the 300 acres of land lying to the north of the Perrin line, unless those 300 acres also lie to the south of the Hancock line. If they do not lie south of the Hancock line they are part of the public domain, and it is the duty of the Secretary to retrace the lines thereof and assert title thereto in behalf of the United States. His discretionary action in asserting that this land is within the public domain can not be controlled by injunction.

The case of *Kirwan* v. *Murphy*, 189 U. S. 35, is in point. This was a suit to enjoin Kirwan, surveyor general of the United States for the District of Minnesota, from making survey of certain land in controversy. The survey of the grant delineated the meander line of the lake as the boundary of the grant. The Land Department held that the land lying between the meander line and the lake, some 1,200 acres, was government land, and ordered it to be surveyed. The execution of this order was restrained, first by preliminary and later by perpetual injunction.

This court reversed this decree and ordered the bill dismissed.

After holding that if the complainants were owners of the 1,200 acres in controversy the proposed survey would be but a fugitive and temporary trespass, lacking the elements of irreparable mischief, and that a bill of peace will not lie where the legal remedy is adequate and persons directly interested are not made parties, are not numerous, and assert separate

and independent rights, the Court, in speaking through Mr. Chief Justice Fuller, said (p. 54):

> But, in the next place, was the Circuit Court justified in thus arresting the action of the Land Department in proceeding with a survey under the circumstances? In other words, can the Land Department be stayed in the discharge of a duty, not ministerial, but involving the exercise of judgment and discretion, on the ground that its jurisdiction has been lost by estoppel? We do not think so, and hold that complainants' contention that they are entitled to bound upon the lake involves a legal right, which cannot be properly passed on until after the department has acted.
>
> Having participated in the proceedings before the department, complainants, after survey was ordered, obtained this injunction against further administrative action, on the ground of absolute want of power, and not of error in its exercise.
>
> The administration of the public lands is vested in the Land Department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. *Whiteside* v. *United States*, 93 U. S. 247; *Moffat* v. *United States*, 112 U. S. 24; *Hume* v. *United States*, 132 U. S. 406, 414. The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the Land Department, charged with the duty of surveying the public domain, must pri-

> marily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action. *Brown* v. *Hitchcock*, 173 U. S. 473.

In *Minnesota* v. *Lane*, 247 U. S. 243, a bill of complaint was filed by the State of Minnesota to quiet title to certain lands in that State and to enjoin the Secretary and the Commissioner from issuing a patent for the land to the Immigration Land Company, who had made application to purchase under the railroad adjustment land grant act of March 3, 1887, 24 Stat. 556, c, 376. It was contended by the State that the lands were within the limits of the Itasca State Park granted to the State by the act of August 3, 1892, 27 Stat. 347, c. 362. A hearing was held in the Land Department upon the issue between the State and the Immigration Land Company which was determined in favor of the latter and a rehearing denied.

The court said (p. 249):

> The purpose of the bill filed in this case is to quiet title to the lands in controversy by a decree in favor of the State of Minnesota notwithstanding the decision of the Secretary of the Interior, and to enjoin that officer from issuing patents for the lands to the Immigration Land Company.
>
> We are of opinion that the State has mistaken its remedy, and if it be true that the Secretary has made a mistake in overruling

> the contention of the State that the title passed to it under the Act of August 3, 1892, relief must be sought in the courts after the issuance of patent.

And further (p. 250):

> The Act of 1887, under which the Immigration Land Company claims title, specifically provides that patents shall be issued for lands to which the purchaser is entitled. The patents not having issued, the lands in controversy were still in course of administration in that department of the Government which, until patent issues, has exclusive control of proceedings to acquire the title.
>
> As we have said, the remedy must be sought in the courts after the issuance of patent. Under such circumstances as are here disclosed this court has uniformly so held. *Litchfield* v. *The Register*, 9 Wall. 575, 577; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592, 593; *Brown* v. *Hitchcock*, 173 U. S. 473; *Kirwan* v. *Murphy*, 189 U. S. 35; *Lane* v. *Mickadiet*, 241 U. S. 201, 208, 209.

See also *Ness* v. *Fisher*, 223 U. S. 683; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; and *Whitaker* v. *McBride*, 197 U. S. 510, 515.

8. Innumerable law suits and irreparable injury.

The allegation of the bill that the retracing of the Perrin survey will necessitate the institution of innumerable law suits and cause irreparable injury is answered by the holding of this Court that "the

proposed survey would be but a fugitive and temporary trespass, lacking the elements of irreparable mischief"; and if the action of the Secretary in this behalf would cause innumerable law suits, persons interested in bringing those suits are not made parties here, and assert separate and independent rights. *Kirwan* v. *Murphy*, *supra*, pp. 53, 54; *New Mexico* v. *Lane*, *supra*.

4. Jurisdiction of the Land Department and indispensable parties.

The case of *Minnesota* v. *Lane*, *supra*, and authorities therein cited, demonstrate that while the Land Department is undertaking to administer the land lying between the Sickler and Perrin survey as part of the public domain, there is no jurisdiction in the courts to afford relief to the parties complaining of the action of the Department. The remedy must be sought in the courts after patent issues. See also *Ness* v. *Fisher* and *Riverside Oil Company* v. *Hitchcock*, *supra*.

The Court of Appeals, to sustain its finding that after the approval of the Sickler survey the jurisdiction of the Secretary over this survey and the land in controversy ended, relies upon *Noble* v. *Union River Logging Co.*, 147 U. S. 165; *United States* v. *Schurz*, 102 U. S. 378; *Moore* v. *Robbins*, 96 U. S. 530; and *New Orleans* v. *Paine*, 147 U. S. 261. These cases are undisputed authority for the proposition that after patent to land has been issued and title thereto has passed from the Government, the Land Department has no jurisdiction over the land. Nor

is it disputed that after land has been patented according to a survey, title vests in accordance therewith (*Dominguez* v. *Banning*, 167 U. S. 723, 739); and the Secretary has no jurisdiction thereafter to correct the survey. These authorities might properly be relied upon if the Secretary were attempting to interfere with the Hancock survey and an injunction was sought in that behalf. They have no application where the Secretary is simply endeavoring to locate where the original survey runs on the ground, and is asserting title to all the public domain to the north of that line.

It appears that there are settlers upon the land in controversy, two of whom protested the approval of the Sickler survey (R. 13), and the order of the Secretary of the Interior complained of permits these settlers to apply for this land. They are asserting legal rights to enter these lands and the right to the possession thereof. They are the real parties whose interests are to be affected and their claims are adverse to the plaintiffs. The injunction directed to issue will prohibit the Land Department from entertaining their applications, and destroys their rights without a hearing. Of this situation the Supreme Court, in *Kirwan* v. *Murphy*, 189 U. S. 35, after citing *Litchfield* v. *The Register and Receiver*, 9 Wall. 575, where an injunction was sought to restrain the officials of the Land Department from entertaining and acting upon an application to preempt certain lands and the bill averred that the complainant was the legal owner of the lands; that they were not public

lands and were in no manner subject to sale or preemption by the Government or its officers, said (pp. 55, 56):

> It was held that the fact that complainant asserted himself to be the owner of the tract of land, which the officers were treating as public lands, did not take the case out of that rule, where it was the duty of these officers to determine, upon all the facts before them, whether the land was open to preemption or sale; and further, that if the court could entertain jurisdiction, the persons asserting the right of preemption would be necessary parties to the suit.
>
> Mr. Justice Miller further said: "After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they give patents to the applicants for preemption, the courts can then in the appropriate proceeding determine who has the better title or right."
>
> And: "It appears on its face, that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to preempt these lands. These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of

> establishing their right, and in this mode a valuable and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform."

See *New Mexico* v. *Lane*, 243 U. S. 52, 58.

In *Minnesota* v. *Northern Securities Company*, 184 U. S. 199, 235, Mr. Justice Shiras, speaking for the Court, says:

> The established practice of courts of equity to dismiss the plaintiff's bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel. *Shields* v. *Barrow*, 17 How. 130; *Hipp* v. *Babin*, 19 How. 271, 278; *Parker* v. *Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black, 545.

In advance of final action by the Secretary in issuing patents to the homestead claimants for the land lying between the Sickler and Perrin surveys, which in the judgment of the Secretary is a part of the public domain, the courts will not interfere with the regular and orderly administration of the public land laws (*Humbird* v. *Avery*, 195 U. S. 480, 510), and the fact whether or not the 300 acres of land in controversy is part of the public land or of the

Muscupiabe grant can not be determined in this injunction suit.

We therefore confidently submit that there is a lack of jurisdiction to entertain the bill and a lack of jurisdiction to interfere with the action of the executive in determining what are public lands.

III.

The decree of the Court of Appeals is erroneous in awarding an injunction instead of remanding the case, recognizing the right of the defendant to answer and contest the bill on the facts.

Had the Supreme Court of the District of Columbia overruled the defendant's motion to dismiss it could not have entered a final decree. Defendant had five days thereafter in which to file an answer and contest the case on the facts. Equity Rules of the Supreme Court of the District of Columbia, No. 32.

When the Court of Appeals reversed the decision of the Supreme Court of the District and denied the motion to dismiss the bill of complaint it should have remanded the case for procedure under these rules. Certainly the defendant is not to be penalized because the court of first instance sustained his motion to dismiss the bill.

It may be that a discretion rests in appellate courts, upon overruling a motion to dismiss, to direct a decree or to remand for further proceedings, but the former alternative can only be adopted where under no state of facts could the defendants prevail in whole

or in part. It is *prima facie* inconsistent with the right of defendants to a full hearing and as well with the principle that the function of a demurrer, or motion to dismiss, is to demand the judgment of the court whether the defendant shall be compelled to answer the bill.

The new General Equity Rule No. 29, which is practically the same as said Equity Rule No. 32 of the Supreme Court of the District of Columbia, after abolishing demurrers and pleas and permitting defenses in point of law arising upon the face of the bill to be made by motion to dismiss or in the answer, provides:

> If the defendant move to dismiss the bill or any part thereof, the motion may be set down for hearing by either party upon five days' notice, and if it be denied, answer shall be filed within five days thereafter or a decree *pro confesso* entered.

The time-honored principle is thus laid down that a defendant should have opportunity to first test the legal sufficiency of the bill by motion to dismiss, and if unsuccessful, should still have opportunity to answer. In the recent case of *United States* v. *Mackey*, 216 Fed. 126, a ruling in point was made in the appellate court. Here the United States filed a bill to quiet title to certain Indian lands. Demurrers were filed, treated by the trial court as motions to dismiss under the new Equity Rules, and sustained, whereupon the United States appealed from the

decree dismissing the bill. In reversing this decision the Circuit Court of Appeals says (p. 127):

> We may properly say by way of premise that it would be unfortunate if the court should be compelled to decide the grave and important questions arising in this litigation, upon a mere motion to dismiss the bill and without the full presentation of the facts by way of lawful evidence.

And again (p. 128):

> The United States has never at any time had an opportunity to show by evidence that the allegations contained in paragraph 3 of the bill were true. On the contrary, they have been turned out of court by a finding that the Creek Nation had no right or interest in the land, and this not upon any showing of the United States, but upon a case gathered from the world at large.

The decision was as follows (p. 129):

> We think we can not do otherwise than reverse the decree of dismissal and remand the case with instructions to the trial court to deny the motions to dismiss *and allow the defendants to answer if they shall be so advised.* [Italics ours.]

The long-established practice of this court in like situations sustains our contention. *Davis* v. *Tileston*, 6 How. 113, was a bill in equity to enjoin a judgment. Defendants demurred to the bill, the demurrer was sustained, and the bill dismissed. An answer had also been filed a few days previous to the

judgment, but for some reason was not considered, and the only question before this Court was whether the judgment dismissing the bill on the demurrer was correct. The Court held that it was not correct, but said (p. 118):

> But as the answer in the present decision must be put out of the question, and as the demurrer admits all facts duly alleged in the bill, the plaintiff seems entitled to judgment on these admissions, though, to prevent injustice by oversight or mistake, we shall take care to render such an opinion that the respondents can be enabled in the court below to avoid suffering, if they possess a real and sufficient defense to the bill.

The decision was (p. 121):

> The judgment below in favor of the demurrer is therefore reversed. But in order that justice may be done between these parties on the answer and any evidence either of them may wish to file, final judgment is not rendered here for the plaintiff, but the case is remanded, in order that leave may be given to the respondents to withdraw their demurrer, and the cause to be heard on the bill and answer, if no evidence is desired to be put in; or on these and such evidence as the parties may wish to offer.

See also:

Erwin v. *Parham*, 12 How. 197, 206.
Clearwater v. *Meredith*, 21 How. 489, 493.
Virginia v. *West Virginia*, 206 U. S. 290.

CONCLUSION.

The judgment of the Court of Appeals of the District of Columbia should be reversed and the judgment of the Supreme Court of the District dismissing the bill of complaint should be affirmed.

Respectfully submitted.

ALEX. C. KING,
Solicitor General.
FRANCIS J. KEARFUL,
Assistant Attorney General.

JANUARY, 1919.

○

CASES AND DECISIONS CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 219.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR, APPELLANT,

vs.

JOSEPH J. DARLINGTON AND JOHN H. CLAPP, TRUSTEES, ESTATE OF JOHN M. CLAPP, DECEASED.

BRIEF FOR DEFENDANTS IN ERROR.

Statement.

This case comes before the court upon an appeal by Franklin K. Lane, Secretary of the Interior, from the decision of the Court of Appeals of the District of Columbia, granting the petition of the defendants in error for a writ restraining him from carrying into effect his certain order made with respect to a contemplated resurvey of a portion of the boundary of a certain Mexican private grant, known as the Muscupiabie Grant.

The grant in question was confirmed by the commission appointed to adjust Mexican land claims, and following the confirmation a survey of the outer boundary of the grant was made by one Hancock in 1867, which survey was finally approved by the Secretary of the Interior, and the patent of the United States was issued for the grant according to said survey, June 22, 1872.

At the time of the issuance of this patent the adjoining public lands were unsurveyed, but their survey was undertaken in 1885, and incidental to such survey it became necessary to retrace the boundaries of the patented private grant, and this was undertaken by one Perrin, deputy surveyor. About this time a bill was filed by the United States to set aside the patent issued for the private grant on the ground that the approval of the Hancock survey had been procured by fraud and misrepresentation, and because of this suit final action upon Perrin's retracement of the grant was suspended pending the result of said suit. The litigation involving the grant terminated with the decision of this court, which refused to sustain the allegations of fraud, but sustained the validity of the location of the grant and dismissed the bill (United States *vs.* Hancock, 133 U. S., 193). It was following this decision that Deputy Surveyor Perrin completed the retracement or resurvey of the grant under special instructions in 1896.

The grant in question is very irregular in shape, there being in the Hancock survey 49 calls or stations. Perrin's survey found the marks established by Hancock in place, or as established by him, the markings were acquiesced in by all interested parties, except between stations 20 and 25.

The present controversy deals with the portion of the grant between the stations last named. These stations occur along the northern boundary of the grant, and the real difficulty arises from the running of the line between stations 20 and 21.

Hancock's survey from stations 20 to 21 was at a distance of *30* chains to a sycamore tree. Perrin, in 1885, found a burnt sycamore tree at *30.15* chains. In completing his survey in 1896, he ran from station *20* on a random line *20* chains to a blazed sycamore tree, which he reported as known by old settlers as M-21. He prolonged the line to *30* chains and reported that he found no trace of a sycamore tree or evidence of there ever having been a tree at that point. He therefore determined that the sycamore at *20* chains was the proper corner, which he established as station 21 under the grant, and fixed the intermediate stations 22, 23 and 24 from this point following the courses and distances established by the Hancock survey, closing on station 25.

Protest against this survey reported by Perrin in 1896 was made by the owners under the grant, because by establishing station 21 at *20* chains instead of *30* chains, as called for by the Hancock survey, about 300 acres were excluded from the grant.

Because of the discrepancy in the two surveys made by Perrin in 1885 and in 1896 between stations 21 and 25, and certain other errors apparent on the face of his return, he was required to show cause why he was unable to place confidence in the retracement of his corners from 21 to 25 made in 1885, and why he should not return to the field and correct his survey.

On his response to the rule, the Commissioner of the General Land Office, by his letter of October 30, 1901, accepted the Perrin survey as a compromise line, from which appeal was taken to the Secretary of the Interior by the owners under the grant. Before this appeal was acted upon, the Commissioner of the General Land Office requested return of the papers, in order to have further examination made of this part of the grant, and it seems that two further examinations were made by one Hollyday and one W. S. Owen, special examiners.

It seems that these further examinations made were under instructions that required an ascertainment of the location under the terms of the original grant rather than an attempt to locate the survey of the grant made by Hancock. As a result of these investigations, the Perrin line as reported in 1896 *was found to comply substantially with the terms of the grant*, and for that reason the Commissioner of the General Land Office again determined to approve that survey, from which action the owners of the grant again appealed to the Secretary of the Interior, the matter being considered and disposed of in departmental decision of October 30, 1902, a complete copy of which is an exhibit to the bill filed in this case, and will be found beginning page 5 of the record.

An examination of this departmental decision will show that every phase of the case was fully and carefully considered and disposed of, as a result of which the Perrin Survey of 1896 was discarded, and directions clearly outlined for the survey of the grant between stations 20 and 25, and in that connection it was directed:

> "If any natural or artificial object indicating or marking Hancock's line of survey can be found they must necessarily control, and all parties in interest should be afforded an opportunity to establish such monuments if they can be found; but if they cannot be identified as Hancock's original corners or stations by some ascertained monument or object the line of survey must be established by the course and distance given in the patent but closing upon Station 25, irrespective of course and distance."

In accordance with instructions given a survey was made by Deputy Surveyor Sickler, which established and monumented the corners or stations numbered 21, 22, 23, and 24, thus connecting the stations as established by the Perrin Survey from 20 to 25. The plat of survey of the grant as thus established was duly approved by the Commissioner of

the General Land Office May 19, 1906, and by the Secretary of the Interior February 28, 1907.

It was under the boundaries of the grant thus established and monumented upon the ground that the surrounding public lands were connected and have since been disposed of, and thus the matter has rested as a closed transaction until upon the protests filed in May and June, 1913, challenging the correctness of the Sickler survey made of this grant and approved as before stated in 1907, that the plaintiff in error, acting through his First Assistant, by order dated September 5, 1913, attempted to resume jurisdiction of the question as to the proper location and markings of this grant, and to set aside the departmental order of 1907 approving the Sickler survey, with instructions to take appropriate steps to re-establish and appropriately mark the Perrin survey of 1896, and to permit the claimants to the adjoining lands to amend their entries so as to include the portion excluded from the grant by said last-mentioned survey.

This is the order against which the bill in this case was directed and against the carrying of the same into effect the court below granted injunction. A copy of the departmental order of September 5, 1913, was made Exhibit "B" to the bill filed in this case, and will be found beginning page 13 of the record.

It is our contention that the decision of the court below must be sustained upon the ground: *First*, that the departmental order of 1902 rejecting the Perrin survey between stations 20 and 25 was a proper determination and the only decision possible upon the record, and that the order of 1913 herein complained of was arbitrarily issued without justification; and *second*, that the investigation resulting in the final approval of the Sickler survey of the grant in 1907 was a finality, and that the later order of 1913 was *ultra vires*.

ARGUMENT.

I.

In 1885, when the survey of the surrounding public lands was undertaken, it was incident to such surveys that the patented private grant here in question be first appropriately and definitely located upon the ground, for the public lands must begin at the outer boundary marking the extreme limits to the grant.

This grant had not only been confirmed under the law and patented, but the boundaries of the grant as established by the Hancock survey had been sustained by the decision of this court in United States *vs.* Hancock, *supra*. It was therefore not within the power or authority of the officers of the Land Department to change or amend the boundaries of the grant as thus outlined and fixed by the Hancock survey. The Land Department could only relocate the line as fixed by that survey in order that the adjoining public-land surveys might be closed upon it, and as held by the Secretary of the Interior in his decision of October 30, 1902, the general rules that govern in the establishment of boundaries are applicable to and control in relocating and re-establishing that line.

Those rules and the order in which they are usually considered are: *First*, natural boundaries; *second*, artificial marks; *third*, adjacent boundaries; and *fourth*, course and distance. These rules, however, are not inflexible, as where the location of monuments and objects called for are involved in doubt and obscurity and cannot be ascertained with any reasonable degree of certainty, and where no mistake can reasonably be supposed in course and distance. The controlling principle in the location of boundaries being that what is most material and certain in a description must prevail over that which is less certain. Tyler on Boundaries (30); Newsom *vs.* Pryor's Lessees (7 Wheat., 7). But,

where natural or artificial objects are wanting, course and distance must govern in the absence of a more certain call. "If a grant be made which describes the land granted by course and distance only, or by natural objects not distinguishable from others of the same kind, course and distance, though not safe guides, are the only guides given us and must be used. Chinoweth *vs.* Haskell's Lessees (3 Pet., 92)."

The record shows that while it was found impossible to exactly locate the Hancock survey of this grant according to its courses, distances and monuments, yet the several stations as identified and re-established by the Perrin surveys made in 1885 and 1896 were acceptable to all parties, excepting those occurring between stations 20 and 25.

Between 20 and 25 no one of the stations as monumented by Hancock could be actually located and identified. It may be that the suit attacking the validity of the grant led to the destruction of the monuments by encroaching settlers on the adjoining public lands. As before stated, the whole difference regarding the survey of this grant grew out of the attempted location of station No. 21.

When Perrin made his survey of the grant in 1885, he retraced the line from station 20 to station 21 by running north 54 degrees east 30.15 chains to a burned sycamore stump. This he accepted in that survey as station 21, and this substantially met the call of the Hancock survey. In resurveying this line in 1896 he ran from station 20, 54 degrees east on a random line *20* chains to a blazed sycamore tree, which he reported as known by old settlers as station 21 of the grant, and which he adopted. Prolonging the line to 30 chains, as called for by the Hancock survey, he reported there was no evidence of a sycamore tree at that point.

Owen, the special examiner, later reported that at about *30* chains from station 20 of the Perrin survey he found a burned sycamore stump, which the Secretary in his decision of October 30, 1902, *supra*, held was evidently the stump found and reported by Perrin in his survey of 1885.

In summing up the result of the several surveys, the Secretary of the Interior, in his decision of October 30, 1902, held:

> "It does not appear from the returns of the Perrin survey of 1896, or from any of the reports of the examination thereof, that 'M 21' of Hancock's survey has been identified sufficiently to warrant the termination of the line at 20 chains. The mere fact that Perrin found a blazed sycamore there having no distinguishing mark from other trees of the same kind, furnishes no proof that it is the original tree designated by Hancock as 'M 21' especially when found by such utter disregard of distance and to a certain extent out of course. The rule that monuments will not invariably control where they are involved in doubt and obscurity and where no mistake can reasonably be supposed in course and distance, applies with great force in this case where the supposed monument contains no evidence of the identity of the original monument and where it cannot reasonably be supposed that such excessive error in distance could have occurred."

It will be remembered that the portion of the grant between stations 20 and 25 was along the northern boundary of the grant, and according to the decree of confirmation, the grant was bounded on the north and east by "the foot of the mountain." Owen, in his report on the survey, which, as before stated, was made more with an idea of locating the line according to the decree of confirmation than a reproduction of the Hancock survey, said: "The question of determining the 'foot of the mountain' is an intensely difficult one, and is purely a matter of judgment, and construction of the definition of that phrase." In the absence, therefore, of the actual location of the monumented stations as fixed by the Hancock survey, there was surely no warrant to depart from the actual calls of the Hancock survey in fixing the limit of the grant in that locality. We say, therefore, not only was the decision of October 30, 1902, justified in re-

jecting the Perrin survey, but that no other determination was possible on the record than that made by said decision.

The subsequent survey made by Sickler was under direction to identify the monuments, if possible, and to hear all interested parties with respect thereto, but that failing to locate the actual monuments fixed by the Hancock survey, course and distance was the only guide remaining and must be followed, arbitrarily closing on station 25, accepted by all the interested parties.

It was in accordance with the directions thus given that the Sickler survey was made and monumented upon the ground, and the plats of that survey duly received the approval of the Commissioner of the General Land Office and of the Secretary of the Interior.

Let us now look to the order or decision of September 5, 1913, herein complained of, by which it is proposed to remove the Sickler survey as monumented and substitute in lieu thereof the Perrin survey, discarded in 1902. In said order or decision it is stated:

> "Perrin's survey having been approved and rights thereunder having attached, the Department was not justified, upon the ground that it was arbitrary, in setting it aside in favor of a survey wholly lacking in any evidence or correctness as a relocation of the Hancock survey except such as were afforded by courses and distances clearly shown to have been incompatible." (Page 16 of the record.)

The serious error herein is the misstatement that Perrin's survey had been approved and rights thereunder attached. As is shown clearly in the decision of October 30, 1902, while the Perrin survey was accepted by the Commissioner of the General Land Office, the grantee claimants appealed therefrom, and it was upon this appeal that the decision of October 30, 1902, was rendered.

It cannot be seriously questioned that the Secretary of the Interior was invested with jurisdiction to set aside the order

of the Commissioner of the General Land Office in accepting this survey. Any question in this regard is disposed of by the decision of this court in Knight *vs.* Land Association (142 U. S., 161). In that case it was held that:

> "The Secretary of the Interior had ample power to set aside the Stratton survey of the San Francisco Pueblo lands (although approved by the Surveyor General of California, and confirmed by the Commissioner of the General Land Office, with no appeal), and to order a new survey; and his action in that respect is unassailable in a collateral proceeding." (Syllabus.)

If the Secretary of the Interior possessed the power to set aside a survey of a grant approved by the Surveyor General and the Commissioner of the General Land Office *with no appeal*, surely his power is not lessened by the fact that the grantee claimants, within the time allowed therefor and in due accord with the rules, appealed from the action of the Commissioner of the General Land Office in accepting the Perrin survey.

Again, although the order of September 5, 1913, states that rights had attached under the Perrin survey, the rights referred to are not defined, and there is surely nothing in the order or in this record to show the existence of any rights adverse to those of the grantee claimant, and, as before stated, as the order accepting the Perrin survey was regularly considered by the Secretary of the Interior and held for naught, the survey being discarded and a new survey ordered, surely no rights could have attached under the Perrin survey.

In this connection it may not be inappropriate to call attention to the manner in which the Secretary's jurisdiction was attempted to be revived and the absolute disregard of the vested rights of the grantee claimants under the prior final departmental approval of the Sickler survey.

The decision or order of September 5, 1913, shows that it was predicated upon protests of certain-named parties, whose

claimed rights, if any, are not defined, although it may be accepted that they are persons who had entered or claimed under entries made of the public lands abutting upon the outer boundary of the grant as returned by the approved Sickler survey. It will also be noted that certain *ex parte* affidavits are referred to and accepted, all without notice to the grantee claimants or opportunity to be heard, and clearly without a hearing ordered, and on the false premise of the alleged approval of the Perrin survey an order was made that: "The approval of the Sickler survey is vacated and that survey is hereby rejected and held for naught; the line established by Perrin between stations 20 and 25 is adopted as the boundary of the grant, and you are directed to take appropriate steps to re-establish and appropriately mark Perrin's line and the lines of the public lands affected thereby."

In the court below granting injunction against carrying the order of September 5, 1913, into effect, the court, after a full review of the case, holds with respect to said order:

> "But the order before us is not to make further endeavor to establish the correct Hancock line, but to arbitrarily set aside the order confirming the Sickler survey and to substitute the Perrin line."

This is fully sustained by the record, and in our opinion is sufficient in itself to warrant the injunction against carrying that order into effect, conceding that jurisdiction was still retained in the Land Department for the purpose of reopening the settled controversy with regard to the boundaries and identification of this private land grant.

We have gone into the matter thus in detail, believing, as before stated, that no other conclusion than that reached in the final approval of the Sickler survey was possible on a fair consideration of the case upon its merits, and that the order of September 5, 1913, was without legal justification.

11.

Conceding the power in the Interior Department to retrace the patented grant in order to survey the adjoining public lands, the investigations respecting the retracement of the patented grant was a necessary incident, and in the absence of fraud was a finality, so far as the Land Department is concerned.

There has never been, nor is there in the present record, any suggestion of fraud in connection with the proceedings resulting in the final approval of the survey retracing and re-establishing the boundaries of this grant in connection with the survey of the surrounding public lands occurring, as before stated, in 1907.

The purpose of the bill filed in this case was neither with a view of investing the courts with jurisdiction to make or to correct a survey of the public lands. The land embraced within this patented grant was never a part of the public lands, and while the Land Department must determine where the private grant ended and where the public lands began, there must necessarily be a limit to the exercise of this jurisdiction.

If the final approval of the Sickler survey made after the full investigation that preceded it was not a finality, surely a further survey, as proposed by the order herein complained of, even if approved by the present Secretary or his successor, would not amount to a finality, and thus the matter of the final determination of the limit of this grant would forever remain an open question liable to contest and controversy in the Land Department for years to come.

When taking up the survey of the surrounding public lands in 1885, it was first necessary to locate the lines of the patented grant, for, as before stated, where the grant ended the public lands began. Undoubtedly the Secretary of the Interior possessed that jurisdiction that enabled him to in-

vestigate, re-establish, and fix upon the ground the limits of the patented grant incidental to the survey of the adjoining public lands. It is in this manner that the survey of the public lands must be undertaken.

Possessing this power to decide, the full exercise of the power ended with the final approval of the Sickler survey in 1907. As held in the decision of the court below:

> "But the crucial question here presented goes to the jurisdiction of defendant Secretary to reopen this case. The order for the remonumenting of the Hancock survey extended an invitation to all persons in interest to be heard, including those who had settled upon or initiated claims to surrounding lands. By this action the boundaries of the patented claim became fixed as the established mark or demarkation between it and the surrounding public domain. With the approval of the Sickler survey, made in accordance therewith, we think the jurisdiction of the Secretary ended." (Record, page 28.)

In the argument of this case below it was urged that this case is controlled by the decision of this court in the case of Kirwin *vs.* Murphy (189 U. S., 35). In that case a survey had been made and returned by which a supposed lake was meandered as containing within the exterior limits of the lake several thousand acres of land, when in reality the actual water line covered less than half that amount. Disposal had been made of certain uplands surveyed and returned by legal description as bordering on the purported meander line of the lake.

On discovery of the error in the return made by the public surveys, the Government, without in anywise interfering with the lines of or the acreage of the upland returned and disposed of, was proceeding to survey the omitted land adjoining said disposed-of tract, and the owner of the latter tract sought by injunction to restrain claiming lands beyond the lines of the tract which he had purchased, resting his claim solely upon the error in the Government survey. This

court held that the Land Department could not be restrained from investigating whether or not there was Government land between *the line defined in the patent* for the disposed-of tract and the lake. In this connection the court said, at page 54 of the opinion:

> "The power to do so is reposed in the political department of the Government, and the Land Department, charged with the duty of surveying the public domain must primarily determine what are public lands subject to survey and disposal under the public-land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts *before it has taken final action*."

In the present case the Land Department, as heretofore repeatedly admitted, possessed the right to fix and determine the boundary between the patented grant and the adjoining public lands, but when this right had been exercised and the matter had been closed by the final approval of the plat reestablishing and monumenting the boundaries of the patented grant, the jurisdiction of the Land Office officials necessarily ceased. The distinction is clearly pointed out in the decision of this court in the case of Kirwin *vs.* Murphy, *supra*, for it is therein said:

> "Noble *vs.* Union River Logging Co., 147 U. S., 165, is not to the contrary, for that was a case where the executive department had confessedly finally acted and then attempted to resume jurisdiction, and an injunction was sustained."

The decision of this court in the case of New Orleans vs. Paine (147 U. S., 261), is very illuminating on this point. That case involved a survey of a grant, made April 3, 1879, by the proper authorities of the Province of Louisiana, to one Pierre de Lille Dupard.

Upon the acquisition of the territory of Louisiana by the United States under the Treaty of 1803, the greater part of this grant was confirmed to John McDonough & Company. In due course, the Government surveyed and fixed the front

and side lines of the grant, but it seems that neither of these lines touched Lake Mareupas, one of the calls in the grant, nor was it included between them.

In 1885, the State of Louisiana, claimant under the swamp land-grant adversely to the city of New Orleans which had succeeded to the title under McDonough, raised the question before the General Land Office as to what depth the grantee claimants were entitled. Thereupon, proceedings were had in the Land Department, the Surveyor General to whom the matter had been referred, deciding that the grant should extend to Lake Mareupas and the Amity River by extending its lower side line back to said water boundary.

On appeal, the Commissioner of the General Land Office affirmed the Surveyor General, but on further appeal, the then Secretary of the Interior, Mr. Lamar, decided January 6, 1888, that the depth of the grant should be determined in a different manner. Survey was thereafter made under the Secretary's direction, which never received the approval of the Secretary of the Interior, and his successor in office, Mr. Chandler, then acting as Secretary of the Interior, when the matter came before him for decision, May 14, 1891, disagreed with the survey as made under the previous Secretary's decision, and directed a new survey, and the action in question was brought against the surveyor to prevent a second survey, urging that the rights were fixed and determined under the decision of Secretary Lamar.

In disposing of this case, the court, after referring to its prior decision in Noble *vs.* Union River Logging Company, *supra*, said:

> "So, in this case, if it were made to appear that the former survey had been completed and approved in such manner that all the lands included within the lines of the former survey had become vested in the plaintiff, it is possible that it might be entitled to an injunction against any act which would have the effect of disturbing or unsettling a title thereby acquired. But the difficulty here is that the facts do not exhibit such a case. * * *

> "It is quite evident from this correspondence that the first survey was never formally approved by the Secretary of the Interior or the Commissioner of the Land Office, and that no title ever vested in the plaintiff to the lands included in this survey, though defendant, having obeyed his instructions, was, of course, entitled to his pay. If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. *Until the matter is closed by final action*, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing."

The clear distinction between the case at bar and the one considered by the court in the decision just quoted from, lies in the fact that in that case, while Secretary Lamar gave directions regarding a proper survey of the grant, when the matter again came before the department for final action, the then Secretary, without questioning the correctness of his predecessor's decision, differed with the Surveyor General in the construction thereof, and undoubtedly the jurisdiction was retained in the department until the final action of the Secretary in approval of the survey made.

In the case now before the court as fully shown, not only did the Secretary give directions as to the manner of defining the grant according to the Hancock survey, but the survey made under his direction received his final approval, and thereby the matter was closed by final action and the rights of the parties became thereby vested and fixed.

In the recent decision of this court in *Ex. rel.*, Knight *vs.* Lane, Secretary of the Interior (228 U. S., 6, 13), mandamus was denied because final action had not been taken by the Land Department, and in that case it was said:

> "As entirely opposite, we repeat the statement in New Orleans *vs.* Paine (147 U. S., 261, 266): 'Until the matter is closed by final action, the proceedings

> of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.' "

Thus, the principle admitted, although not applied, in the case of New Orleans *vs.* Paine, *supra*, because the facts did not fit the case, namely, that injunction would lie as against the act of an officer who attempted to resume jurisdiction after the matter had been once closed by final action, is again recognized by the court.

Of necessity there must always be a limit to the exercise of a power, particularly so where it has relation to the title to real property, otherwise, there would never be any security in titles obtained to public lands. Ordinarily the jurisdiction of the Land Department, where a patent is required, terminates with the issuance of the patent. In this case the patent had issued under the private grant as long ago as 1872. The power of exercise grew out of the necessity for connecting the lines of the public survey with the grant as previously patented. As said in Williams *vs.* United States (133 U. S., 514-524):

> "It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice."

The jurisdiction possessed in the Interior Department after the issuance of the patent for this grant based upon the Hancock survey, was to locate the lines of that grant for the purpose of establishing boundaries of adjacent public lands as fixed in the Hancock survey, and if the station marks of that survey could not be found, its duty was to establish the

monuments by courses and distances as defined by the Hancock survey, and when that was accomplished by the final approval of the Sickler survey the jurisdiction of the Land Department necessarily ceased.

> "One officer of the Land Department is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court." United States *vs.* Stone, 2 Wall., 525, 535.

As said in the decision of the court below:

> "An order of the Secretary of the Interior, revoking the order of his predecessor re-establishing and monumenting the boundary of plaintiff's grant in accordance with the description in the patent, and arbitrarily substituting a survey considered and condemned by his predecessor, thereby reducing the area of plaintiff's patented grant, is an exercise of power equivalent to the revoking of a patent. It would amount to divesting plaintiffs of their property without due process of law, since a patent can only be annulled or cancelled by a court. Any attempt to thus interfere with rights so vested may be enjoined. In New Orleans *vs.* Paine, 147 U. S., 261, 264, the court, referring to Noble *vs.* Union River Logging Railroad, *supra*, in connection with the question it then had under consideration, said: 'In that case it appeared that the only remedy of the plaintiff was to enjoin the Secretary of the Interior from revoking his approval of a certain map, which operated as a grant of land. His contemplated action amounted in effect to the cancellation of a land patent. So, in this case, if it were made to appear that the former survey had been completed and approved in such manner that all the lands included within the lines of the former survey had become vested in the plaintiff, it is possible that it might be entitled to an injunction against any act which would have the effect of disturbing or unsettling a title thereby acquired.'
>
> "The grantee and his successors have been in undisturbed possession of the patented area for over forty years. Considering a similar situation, involv-

ing the power of the Secretary of the Interior, by an order made in 1861, to challenge a survey of the south line of the Fort Leavenworth Military Reservation made and approved in 1830, the court, in United States *vs.* Stone, *supra*, said: 'It was made in the year 1830, and since that time both parties have held possession and claimed up to the lines then established by the survey. In the case of private persons, a boundary surveyed by the parties and acquiesced in for more than thirty years could not be made the subject of dispute by reference to courses and distances called for in the patents under which the parties claimed, or on some newly discovered construction of their title deeds. We see no reason why the same principle should not apply in the present case.'

"This is the only principle upon which the security of title can rest. If power rests in the Secretary of the Interior to cancel the orders of his predecessors finally determining property rights simply because he differs from them in opinion, there would be no such thing as a vested title derived from the Government. If an order can be revoked forty years after issue of patent, and ten years after final re-establishment of the lines of the patented grant, it can be done after the lapse of a hundred years. Upon the finality of proceedings in the Land Department depends the security of titles emanating from the Government. The present order, if carried into effect, would impair the title of plaintiffs as vested by the terms of the patent. It is, therefore, beyond the jurisdiction of the Secretary, and a restraining order should issue."

It must be clear therefore that the jurisdiction of the Land Department with regard to the grant here in question terminated with the final approval of the survey in retracement of and re-establishment of the boundaries of this grant in connecting the lines of the public survey therewith. This being so, it follows as a necessary incident that the attempted resumption of jurisdiction after the lapse of six years and an attempt to destroy the markings of the grant and establish others at that late day was beyond the authority of the de-

partment, and the action of the officer was clearly *ultra vires*, and for that reason the decision of the court below restraining the plaintiff in error was fully warranted and must be sustained.

It was contended in the court below that no harm could come to the grantee claimants by the proposed action, but this can hardly be seriously contended. In the first place, the attack made by the order, issued under color of office, necessarily places a cloud upon the title of the grantee claimants. As before stated, if it is carried into effect it results in excluding from the grant as surveyed under the final approval given to the Sickler survey about 300 acres. At best, a suit would be necessary in order to remove the cloud thus placed upon the title.

Again, the destruction of the markings of the approved Sickler survey and the substitution of the survey now proposed to monument the old discarded Perrin survey must lead to expense and possible confusion under the conditions clearly outlined hereinbefore. Further, amendment of entries allowed for adjoining public lands under the Sickler survey will necessarily lead to additional confusion, necessitating suits in which such parties are made defendants with incidental difficulties arising therefrom.

Surely, a claimant is not forced to await the visiting of the difficulties proposed and the assumption of a burden to remove the same where, as before stated, the act of the official is clearly unauthorized and without his jurisdiction.

As said by the Court of Appeals of the District in the case of Santa Fe Pacific Railway Company *vs.* Lane (43 App. D. C., 497), afterwards considered by this court (244 U. S., 492):

> "If a court of equity is powerless to stay the hands of an official of the Government from perpetrating through the proposed scheme this threatened injury, the guarantee of justice through the agency of the courts becomes a farce, and the citizen is left without protection from the arbitrary and capricious exactions of executive power."

Appellant's Brief.

In the appellant's brief it is first contended that this is a suit against the United States, solely from the fact that there are three hundred acres of land lying between the Perrin survey, which it is now proposed to substitute for the approved Sickler survey.

It will be remembered that the Perrin survey failed of approval by the head of the Land Department, and that the Sickler survey was the result of his order made when discarding the Perrin survey. The Sickler survey received the approval of the head of the Land Department, and is consequently the only authorized survey. All disputed matters of either law or fact suggested by this appeal received full consideration by the Land Department when the matter of the correctness of the Perrin and Sickler surveys was under consideration, and the decision of the Land Department, ending with the approval of the Sickler survey, was a finality. Hence, the interests of the United States in the premises having been fully determined by the head of the Land Dpartment, the office of the Government charged with the full responsibility in this behalf, eliminates any possible question of a remaining interest in the United States in the premises.

The action complained of in this proceeding is the attempted resumption of jurisdiction by the present head of the Land Department, and while the order complained of is clearly *ultra vires,* it being an act done under color of the office as head of the Land Department, necessarily casts a cloud upon appellees' title, and unless restrained must result in irreparable damage.

Let us consider the decisions relied upon in appellant's brief.

Oregon vs. Hitchcock (202 U. S., 68),

involved claim under the swamp-land grant. The determination of what are swamp lands within the meaning of

that grant rests upon the head of the Land Department, and further the act provides for the issuance of a patent, and until the patent is issued, the Land Department retains jurisdiction to administer the act. In other words, there is no finality until the patent issues.

Louisiana vs. Garfield (211 U. S., 70).

This case also involved claim under the swamp-land grant. There were questions of law and fact respecting the title claimed under the grant, and these could not be determined without the right of the United States to be heard thereon.

New Mexico vs. Lane (243 U. S., 52),

involved claim under the enabling act, which made a grant of certain lands non-mineral in character. Questions concerning the construction of the laws, and questions concerning character of the land and knowledge of it, were all involved; hence, they could not be determined without the right of the United States to be heard.

Minnesota vs. Lane (247 U. S., 243),

involved claim under the grant made to the State of all undisposed-of lands in certain described subdivisions in said State. In a controversy before the Land Department between the State and claimants, the latter claiming under the act of March 3, 1887 (24 Stats., 556), the Department held in favor of the claimants under the act of 1887, but that act required a patent, and none had issued. Clearly the matter was still within the jurisdiction of the Secretary of the Interior, to be terminated only with the issuance of the patent.

Lane vs. Mickadiet (241 U. S., 201),

was an attempt by mandamus to control the Secretary of the Interior respecting an Indian allotment. The Secretary has exclusive jurisdiction to determine heirs of an Indian allottee

in case of death within the restricted period, and this court held that the writ of mandamus would not be issued to control the conduct of the Secretary concerning a matter within his administrative authority.

These cases have no possible application here, for in the case at bar every question, both of law and fact, was passed upon by the head of the Land Department, and, as repeatedly stated, final action taken in approval of the survey delimiting the patented grant in connection with the survey of the adjoining public lands, which survey was made under the specific directions of the Land Department.

Appellant does not question this, but claims the right to disregard the prior adjudication, merely because he disagrees with the conclusion reached. In other words, he claims the right to cancel and annul the final act of his predecessor in this matter, and to reopen and substitute his order in its stead. The mere fact that, through such illegal act, more land would be excluded from a private grant, does not make the United States a party interested in any such illegal proceeding.

Appellant also contends, in effect, that even though his act is unwarranted, it is harmless and is beyond the right of the courts until the threatened injury complained of is actually visited upon the appellees. As hereinbefore shown, the northern and eastern boundary of this grant, according to the decree of confirmation, is "the foot of the mountain." This is very indefinite, and the delineations through monuments placed in actual survey become a necessary incident and a part of appellees' muniment of title.

The Hancock survey undoubtedly fixed the boundary of the grant, but when attempting to connect the lines of the survey of the public lands adjoining the grant, the monuments between stations 21 and 25 could not be identified, and,

under departmental direction, the same were established, or, in other words, the grant was renonumented between stations 21 and 25, in accordance with directions given by the head of the Land Department. Under these circumstances, there can be no question but that, with the approval of the Sickler survey, the monuments established thereby became a part of appellees' muniment of title binding on the grantee claimant, and on those claiming surrounding lands through the United States. To reject the approved Sickler survey, with orders to substitute another in its stead, necessarily calls for the destruction of the markings of the rejected survey; otherwise, confusion must result in a duplicate set of monuments. The order herein complained of is "the approval of the Sickler "survey is vacated and that survey is hereby rejected and "held for naught; the line established by *Perrin between sta-"tions 20 and 25 is adopted as the boundary of the grant, "and you are directed to take appropriate steps to re-estab-"lish and appropriately mark Perrin's line and the lines of "the public lands affected thereby. The Department concurs "in your recommendation that the settlers in the territory in-"volved be permitted to amend their entries to include the "area taken from them by the erroneous approval of the "Sickler survey.*"

In this connection we append to this brief a copy of the letter from the Commissioner of the General Land Office on which the order complained of was based. This shows, beyond question, the real effect of the proposed action.

In appellant's brief it is said, page —, "Plaintiff's title "does not vest either by reason of the Sickler survey or its ap-"proval by the Secretary. 'A survey does not create title; it "only defines boundaries: Russell *vs.* Maxwell Land Grant "Co., 158 U. S., 253-259;' and the destruction of the mark-"ings of the Sickler survey will not affect the title of the "plaintiffs to the grant as patented in accordance with the "Hancock survey."

In our opinion, the Russell case herein referred to fully supports the views herein contended for. In that case the grant involved was confirmed by act of June 21, 1860, but was not surveyed until 1878, and patent issued according to such survey in 1879. The land involved in the Russell Case was within the limits of the grant as so surveyed and patented. Prior thereto, to wit, in 1871, public-land surveys had returned the land involved in the Russell Case as a part of section 20, Tp. 33 S., R. 68 E., April 6, 1874, an ancestor of Russell applied to homestead said described land, and September 5, 1976, proved up and received final certificate therefor. May 19, 1888, the grantee claimant commenced an action to recover possession of the land, and the verdict and judgment were in favor of the grantee claimant. In disposing of the case, this court said, at page 255:

> "The only claim of the defendants is one under the United States, arising on April 6, 1874, fourteen years after the confirmation of the Maxwell Land Grant. It is therefore inferior and subordinate to that of the plaintiff.
>
> "In order to obviate the effect of this, the defendant offered to prove on the trial that the survey described in and upon which the patent was based was inaccurate, and that a correct survey would run the lines of the Maxwell Land Grant so as to exclude therefrom the tract in controversy. This testimony was rejected by the court, and this is the error complained of."

Again, at page 258, it was said:

> "And in the nature of things a survey made by the Government must be held conclusive against any collateral attack in controversies between individuals. There must be some tribunal to which final jurisdiction is given in respect to the matter of surveys, and no other tribunal is so competent to deal with the matter as the Land Department. None other is named in the statutes. If in every controversy be-

tween neighbors the accuracy of a survey made by the Government were open to question, interminable confusion would ensue. Take the particular case at bar; if the survey is not conclusive in favor of the plaintiff, it is not conclusive against it. So we might have the land-grant company bringing suit against parties all along its borders, claiming that, the survey being inaccurate, it was entitled to a portion of their lands, and, as in every case the question of fact would rest upon the testimony therein presented, we should doubtless have a series of contradictory verdicts; and out of those verdicts, and the judgments based thereon, a multitude of claims against the United States for return of money erroneously paid for land not obtained, or for a readjustment of boundaries so as to secure to the patentees in some other way the amount of land they had purchased.

"It may be said that the defendants have the same right to rely upon the regular surveys, that the plaintiff has upon the survey of this special land grant. This is undoubtedly true, but the survey is one thing, and the title another. If sectional lines had been run through the entire limits of the Maxwell grant, it would not thereby have defeated the grant or avoided the effect of the confirmatory act. *A survey does not create title; it only defines boundaries.* Conceding the accuracy of a survey is not an admission of title. So the boundaries of the tract claimed by defendants may not be open to dispute, but their title depends on the question whether the United States owned the land when their ancestor filed his homestead claim thereon. If at that time the Government had no title, it could convey none.

"In this connection it may be well to notice a distinction which interprets some dicta and decisions found in respect to the jurisdiction of courts over boundaries. Whether a survey as originally made is correct or not is one thing, and that, as we have seen is a matter committed exclusively to the Land Department, and over which the courts have no jurisdiction otherwise than by original proceedings in equity. While on the other hand, where the lines run by such survey lie on the ground, and whether any particular

> tract is on one side or the other of that line, are questions of fact which are always open to inquiry in the courts. In the case before us the offer was not to show that the land in controversy was one side or other of the line established by the survey. On the contrary, it was conceded that it was within the limits of the survey, and the offer was simply to show that that survey was inaccurate, and that the lines should have been run elsewhere, but this is not a matter for inquiry in this collateral way in the courts."

It will be seen that the expression taken from this opinion, and quoted in appellant's brief, referred to the survey of the land, and its return in the usual manner, as applied to public lands in 1871, prior to the survey of the confirmed private grant. It had no reference to the boundaries of the grant as fixed by the survey of the Land Department, for it was admitted in that case that the land involved was within the limits of the private grant, as surveyed and patented. As before said, however, in our opinion, the part quoted from said decision fully supports the view herein contended for, and further shows the consequences should such final action regarding the survey of a private grant be held as binding on no one.

This brings us to the final suggestion of appellant's brief, namely, the court below erred in awarding the injunction without opportunity to the defendant to answer.

Replying, we call attention to the fact that the bill filed in this case took its statement of facts from decisions of the Land Departments made exhibits to the bill, and, therefore, there is and could be no question of fact in dispute.

Again, appellant must know that nothing is denied them by failure to be afforded an opportunity for answer, and we call particular attention to the fact that the brief suggests nothing available in support of this feature of the case.

Finally, if this objection is seriously contended, why was effort not made in the court below, by motion for rehearing or otherwise, to secure the opportunity of answering further? Without intention to reflect on counsel, we feel safe in saying the objection to the decision below in this regard is more technical than substantial, and that no good reason is assigned, nor does any exist, for longer prolonging this controversy through a return to the Supreme Court of the District of Columbia, with privilege to answer.

We ask that the decision of the court below be affirmed and the title of the appellees in the premises be put beyond dispute and they thereby saved further expense and annoyance with reference to a title heretofore fully reviewed and approved of, both in the Land Department and this court.

ALEX. BRITTON,
F. W. CLEMENTS,
Attorneys for Appellee.

APPENDIX.

In reply please refer to 313653 "A" J. McP.

Department of the Interior.

General Land Office.

Washington, D. C.

May 16, 1915. A. W. B.

Address only the Commissioner of the General Land Office.

[Stamped:] Dept. of the Interior. Sec'y's Offi., Mails & Files. Received May 17, 1913. To Asst. Atty. Genl.

The Secretary of the Interior.

SIR: It was decided, after an informal conference with your Department, that this office should prepare a report and submit recommendations in the matter of the complaint of Lafayette Mecham, in which he alleges that certain lands belonging to him have been wrongfully included by a resurvey within the limits of the Muscupiabe grant.

Michael Waite in 1843 petitioned the Mexican Government for a tract of land known as Muscupiabe and described as bounded on the north by the foot of the moutain, on the south by Agua Caliente, and on the west by the Alisos, etc. For a history of the case, see United States *vs.* Hancock (133 U. S., 193). The tract as confirmed was surveyed by Deputy Henry Hancock and the plat of such survey was approved June 21, 1872. The tract was patented June 22, 1872.

The Government having failed to set aside the patent in an action brought for that purpose (see decision above

cited), and it being represented that the north boundary was not well defined, Contract No. 389 was entered into with George H. Perrin, a contract deputy, to reestablish the boundary. The tract included within the boundaries of the Muscupiabe grant is irregular in form, the approved plat of survey thereof showing 49 stations in the boundary lines. That part of the boundary between station 20 and station 25 is involved in this inquiry. The lands in dispute are situated in T. 2 N., R. 5 W., T. 2 N., R. 4 W., T. 1 N., R. 5 W., and T. 1 N., R. 4 W. S. B. M. The total area involved is less than 300 acres.

Perrin's survey, after having been suspended for many years, was finally approved by office letter "E" of October 30, 1901. A protest having been filed by J. M. Clapp, of President, Pennsylvania, an alleged owner of the Muscupiabe grant, this office, by letter of March 27, 1902, directed Mr. W. O. Owens, an examiner of surveys, to make a careful examination of such survey and to report his findings. One of the principal reasons for questioning the accuracy of the Perrin survey was that Call 20 of the grant, or the line from station 20 to station 21, was given, in the field notes of Hancock and the patent as issued, as N. 54, E., 30 chains, whereas Perrin ran said line a distance of only 20 chains, as he found at such distance evidence of what he believed to be Hancock's station 21.

In the letter of this office of July 10, 1902, to Examiner Owens, it was said:

> " * * * You report not having found any definite proof or indication that the line 20-21 should be extended to 30 chains instead of 20, there being no evidence of a marked tree or very large stump at that distance and no sign that one was removed, and you find that to run thence on the next course S. 51° E., would carry the line 'through dense brush, over broken and rocky country sloping to the south,' which you regard as still further upon the mountain, hence not agreeable to the terms of the grant. From these and other incidental features found by actual

> examination of the country, your judgment is expressed that you have found no way to carry out the instructions as to making a new line of a more just and equitable nature than the line already run and accepted. The returns of all of the surveyors engaged on this great boundary seem to agree in showing that the Hancock survey cannot be reproduced on the ground from one point to another without alteration in some of the courses and distances, because it was probably erroneous or very carelessly run in 1856. It is, then, hardly consistent to ask that one course (as from 20 to 21) must, as a matter of right, be run exactly as Hancock reported, when that involves the shortening of another course that has the same presumptive value. * * * You were instructed to exercise your judgment in the matter and your conclusion is that you can find no way to adjust the line to the requirements better than it is at present located, owing to physical features which, in your estimation, are prohibitive of any change looking to an accurate and equitable observance of the original conveyance. Your report is approved and the requirement that you execute and establish a new survey is hereby rescinded. * * * "

By office letter "E" of July 12, 1902, addressed to Mr. John M. Clapp, of President, Pennsylvania, this office, after setting forth the facts and discussing the matter at issue at considerable length, declined to revoke the approval of the Perrin line and advised Mr. Clapp of his right of appeal. An appeal having been filed, the Department on October 30, 1902, reversed and vacated the decisions of this office and directed that a new line be established. In disposing of the case the Department said:

> "No part of said line is in controversy except that portion between stations 20 and 25. If any natural or artificial objects indicating or marking Hancock's line of survey can be found, they must necessarily control and all parties in interest should be afforded an opportunity to establish such monuments if they can be found. But if they can not be identified as

> Hancock's original corners or stations by some ascertained monument or object, the line of survey must be established by the course and distance given in the patent, but closing upon station 25, irrespective of course and distance."

In carrying out the instructions of the Department, a contract was entered into with Deputy William A. Sickler for the re-establishment of the boundary of the grant from stations 20 to 25. Lafayette Mecham, C. L. Cate, and other alleged old settlers, protested against the approval of the survey made by Sickler, but this office, in its consideration of the matter in a decision rendered May 19, 1906, dismissed such protests and approved the survey, because, in its opinion, Sickler had executed the work in the manner directed by the Department. From this decision an appeal was filed and the Department February 28, 1907, affirmed the action of this office. A motion for review of the aforesaid Departmental decision was denied June 14, 1907.

The Department, in a letter addressed to Mr. H. H. Chase, of San Bernardino, California, under date of July 22, 1911, said:

> "In reply you are advised that a resurvey of the former line for several miles was made by a contracting surveyor of the General Land Office and his work was inspected and carefully tested by one of the most competent examiners of surveys. After the conclusions of the General Land Office were resisted by the proprietor of the lands within the grant, and after repeated considerations of the case on several appeals, this Department issued final instructions how Deputy Sickler's line should be established and the land office complied with that decision. It appears that Charles L. Cate was one of the few settlers who felt aggrieved at said decision. The survey received a great deal of attention in the years 1900 to 1906, and the survey of Deputy Sickler, made according to the rulings of this Department, was accepted May 19, 1906. The case has been a cause of great expense

to the Government and has been most exhaustively examined both in the field and in the several offices. I therefore consider it extremely unlikely that any new features will be presented requiring the case to be again reopened."

The letter of Mr. Mecham to President Wilson, referred by him to the Department of Justice, and the letter of the Attorney General requesting a report, require that the matter be given further attention.

Stations 20 and 25 of the Hancock survey have been so identified that there can be little question that Sickler and Perrin correctly relocated them. The respective surveys by Hancock, Sickler, and Perrin differ in the following particulars:

Leaving station 20, Hancock ran (see Memorandum 1) from a sycamore 16 inches in diameter, station on right bank of creek 10 links wide, course southwest, up said creek, N. 54° E., 30 chains, to a sycamore 30 inches in diameter. Station 21. Thence S. 51° E., crossing a creek 10 links wide, course southwest, at 1 chain, 43 chains, granite rock, 12x14x18 inches, in a rock mound, station at base of mountains. Station 22. Thence S. 8° 30′ W., 62 chains to station. Station 23. Thence S. 64° E., 15 chains to station. Station 24. Thence N. 26° 30′ E., 103 chains, 71 links, to a walnut tree 4 inches in diameter, station. At the forks of canon on the left bank of stream 12 links wide, course S. 8° W. Station 25.

Sickler surveyed with the courses and distances given by Hancock, beginning at station 20 and arbitrarily closing on station 25. The distance of the line from station 24 to 25, instead of being 103.71 chains was 85.70 chains, a difference of 18.01 chains.

Perrin ran from station 20 up the creek N. 52¾° E., 20 chains; thence S. 50° E., 42.94 chains; thence S. 8° 30′ W., 62 chains; thence S. 64° E., 158.20 chains; thence N. 26° 30′ E., 96.61 chains, to station 25.

Perrin, in a letter dated March 28, 1901, addressed to the Surveyor General of California, explains why he did not extend the line for 30 chains from station 20. He says that to do so would be to disregard the topography given by Hancock, and also a sycamore tree which corresponded to the sycamore which Hancock adopted as his station 21, and which bore evidence of having been marked; further, that to adopt the sycamore above mentioned as station 21, he would, on the next call, cross the creek called for in Hancock's line 21-22, and at substantially the correct distance, with a slight variation of the course, he found evidences of a corner. He further stated that to run line 20-21 the full distance of 30 chains "he would be on the wrong side of the creek and several chains away from it." The Perrin survey was examined in the field by H. P. B. Hollyday, an examiner of surveys, from June 4, to June 7, 1900. Speaking of the location of Hancock's station 21, he says:

> "The question is whether or not it was placed 30 chains N. 54° E., from station 20. From the best evidence that I could obtain, I should say not. * * * "

Extending the line 10 chains on course N. 54° E., from Perrin's closing at sycamore station No. 21, he says:

> "I cross creek several times before reaching 10 chains point, which point falls in creek bed. I look carefully for sycamore tree and also for sycamore stump. I am unable to find any evidence of even a sycamore stump of any size. In fact, the growth of sycamore trees seems to have stopped beyond my 20 chains point." (Perrin's sycamore station 21.)

He further stated that he found a group of alders and willows near where station 21 would be if the line were extended 30 chains from station 20, and that he found there an old detached hemlock stump which had the appearance of having been washed and deposited there by a freshet at some

time. (See Memorandum 6; see also Hollyday's original report.)

May 20, 1899, F. H. Brigham, Examiner of Surveys, submitted a report on Perrin's Contract No. 389, which includes the lines in controversy. (See Memorandum 5; see also Brigham's report.) He said of the Perrin line:

> "I am of opinion that the survey of the fractional townships examined by me as well as the northern boundary of Rancho Muscupiabe to have been properly and carefully executed and in conformity with the requirements of the manual and the deputy's special instructions, and I do not hesitate to recommend the acceptance of the work."

The report of Examiner Owens was made after an examination conducted under the directions of this office, and with full knowledge on his part of the respective contentions of the grant owners and the settlers, and is entitled to careful consideration. He inclosed with his report affidavits of Samuel Martin, Elizabeth Martin, and J. G. Newell.

Newell alleged that he was, in the year 1883, employed as head chainman to assist in making a survey of all the boundary lines of the Muscupiabe ranch; that the survey was made by William Reynolds, who was employed by John Hancock, then owner of the rancho; that Hancock was present at the erection and construction of the monuments thereafter described and designated; that while running the north line of said rancho said Reynolds, in the presence of said John Hancock, fixed and established station 21 at a sycamore tree, the top of which had been cut off and the outside trunk thereof burnt and mutilated by fire, the said Hancock then and there agreeing with the said Reynolds that the said tree truly marked and designated said station 21; that he visited said station 21 on Monday, the fourteenth of August, 1905, and found said burnt and mutilated sycamore tree and recognized the same as the tree which fixed and designated said station 21; that he recognized the

tree as being the one which was designated by the said Reynolds, aforesaid, from its mutilated and burnt condition and its position with reference to natural objects; that the tree was in the same condition as when first seen by him, except that there had been carved thereon the letter "M" and the figures "21"; that at a point 51° E. from said sycamore, 43 chains, the said Reynolds, himself, and other persons, including the said John Hancock, constructed a monument consisting of a pile of rock built about 18 inches high and about 3 feet in diameter; that there was inscribed on one of the rocks in the said monument the letter "M" and the figures "22"; that he visited the said monument on the fourteenth of August, 1905, and found the rock above mentioned, it having inscribed thereon the letter "M" and the figures "22", and that it was the same rock marked by the said Reynolds, aforesaid.

He described further the erection of monuments marking stations 23 and 24 by Reynolds, and the subsequent identification of both in the month of August, 1905; that Reynolds was employed by Hancock to make the survey and was paid for his services in the presence of affiant.

Samuel Martin swore, in the year 1880 he purchased from one Simpson his rights, title, etc., in a tract of land the southwesterly line of which is bounded by that portion of the line of the Rancho Muscupiabe that lies between stations 21 and 22; at the time of the purchase of said land a sycamore tree was pointed out to him as truly marking station 21 of the northerly boundary of said ranch; that he made inquiry of persons residing in the immediate vicinity of said land and learned that the said sycamore tree was universally accepted by all of said persons and residents as truly marking the said station; that the said sycamore was at that time topped and burnt on the southerly side and that there was visible a scar on the south side of said tree 8 or 10 inches square, which showed evidence of having been mutilated by being hacked and cut with some sharp instrument; that at that time a mound of rock lying S. 51° E., 43 chains, was

also pointed out as truly marking station 22 of the said northerly line of said ranch; that about 1892 a controversy arose between affiant and Julius Myers, who then owned the land lying immediately south of the line between stations 21 and 22, as to the true course of the line extending from said station 21 to station 22, and as to the true location of said station 22; that said difference was amicably settled in the year 1896, and adjusted between the parties, and a wire fence constructed by said parties between said stations, beginning at said sycamore tree as station 21, and extending S. 51° E., 43 chains, to the said mound of rock described as station 22, etc.

Elizabeth Martin said, under oath, that she is the wife of Samuel Martin, and the daughter of William Brown; that in 1873 her father settled upon the east half of section 26, township 2 north, range 5 west, S. B. M., and built his house thereon at a point about a quarter of a mile in a northeastern direction from station 21 in the north line of the Muscupiabe ranch, etc.; that she was at that time 12 years of age, and has resided upon said land continuously until the present time, with the exception of about one year; that at the time she took up her residence with her father, as aforesaid, station 21 was marked and designated by a sycamore tree which had inscribed thereon the letter "M" and the figures "21"; that about 28 years ago some person or persons, unknown to the affiant, cut off the top of said tree and burnt the sides and trunks thereof, and that the marks hereinbefore referred to were obliterated therefrom; that about the time said William W. Brown settled upon the land aforesaid, a controversy arose between John Hancock, who then owned the ranch, and the father of the affiant, as to the location of station 21, whereupon a survey was made at the mutual expense of said Brown and the said Hancock, and said sycamore tree was again designated and acknowledged and accepted as truly marking the station 21, and thereafter the same was acknowledged and truly accepted

by said Hancock and by the said Brown as the location of said station.

It is impossible to re-establish Hancock's line from station 20 to station 25 by the courses and distances given by the said Hancock. There is an actual shortage of 18.01 chains in distance, if the lines be extended along Hancock's courses. There can be no question that station 25 has been correctly relocated. It was placed by Hancock at the forks of the cañon, at the point of an acute angle, and was given as a walnut tree 4 inches in diameter, which was described on the approved Hancock plat of survey as Walnut station 25. I regard its identification as beyond question, and there is no dispute about the location of station 20. If, however, it is necessary, in closing the survey, to shift the position of either station 20 or 21, it is manifest that station 25 must remain as it is at present located. But there is no such necessity. Station 20 is accepted by the parties and its *locus* need not be made the subject of further inquiry.

Proceeding, then, upon the theory that stations 20 and 25 are correctly re-established, and, without reference to any previous adjudication of the question by the Department, seeking a solution of the question, I am convinced that the Sickler survey, which threw into the grant a strip of land approximately 10 chains in width, north of and substantially parallel with Perrin's lines 21-22, 22-23, and 23-24, should not stand. If, beginning with station 25, the calls be reversed and lines 25-24, 24-23, 23-22, 22-21, be run their full distances on the courses given in the Hancock survey, and line 22-21 be extended to a point where it would intersect line 20-21, the length of the latter line would be shortened from 30 to 12 chains, and a large portion of what seems to be regarded as the Muscupiabe grant would be thrown without the limits thereof and within the public domain. While, by running line 20-21 its full course, as was done in the Sickler survey, and throwing arbitrarily all the error in line 24-25, nearly 300 acres of very valuable land, that has

unquestionably been occupied in large part by *bona fide* settlers for more than a generation, has been included within the limits of the grant.

The Perrin survey is a compromise between the Sickler survey and one that would result if the lines between stations 25 and 20 were run on the reverse call from station 25 and closed arbitrarily on station 20. There is nothing to commend the Sickler survey, except that it follows absolutely the calls of Hancock from station 20 to station 24 and the course of Hancock from station 24 to station 25; but line 24-25, as re-established by Sickler, is 18.01 chains short of Hancock's line 24-25.

In the absence of any evidence of a corner between stations 20 and 25, and confronted by the fact that Hancock's courses and distances between those two stations is impossible, and if the usual mode of adjusting such discrepancies be followed, a proportionate adjustment of the errors between the two stations would be adopted. Line 20-21 and line 24-25 would be accorded equal dignity, but the error, in the absence of some controlling factor not here disclosed, should not all be thrown in one line. Moreover, to give, as has been done in the Sickler survey, line 20-21 its full distance, is to disregard the little topography that was shown in Hancock's survey, and is to ignore a tree called for as Hancock's station that corresponds with the one described by him, and which seems to have been accepted by all parties in interest as Hancock's station 21. It may very well be that the adoption of a line by the parties in interest would not be binding on the Government, but where, as in this case, it is impossible to re-establish the line from station 20 to station 25, as called for in the patent, and where the parties have, as they appear to have done in this case, accepted a line, which is a fair compromise between the extremes of running from station 20 in Hancock's courses and distances and closing arbitrarily on station 25 without regard to distance, and, on the other hand, beginning with station 25 and reversing the calls and closing arbitrarily on station 20

without taking into consideration the length of line 20-21, I think the compromise line should be adopted.

The Sickler line deprives the Government and the old settlers who claim under it of every foot of land that could, under any possibility, be taken from it and them, and it takes from these old settlers lands situated on or near the base of the mountains which have been occupied adversely to the grant claimants for more than 30 years.

The questions are quite fully discussed in the brief filed in 1907 in behalf of the protestants' motion for review, which was denied by the Department June 14, 1907. The arguments submitted therein so aptly cover all phases of the case that particular attention is now directed thereto. For the information and convenience of the Department, I attach hereto and make a part of this report Memorandums numbered 1 to 9, inclusive.

While several of the interested parties have conformed their entries to the line of the new survey, and have accepted patents for the tracts described by such amended entries, and notwithstanding the fact that the Department has heretofore given extended consideration to this question, I am so fully convinced that these old settlers have been wronged, that I must recommend that the matter of this survey be again reopened, and that the line as established by Perrin be adopted as the boundary of the grant, which being done, that the settlers be permitted to amend their entries so as to include the area that I believe has been wrongfully taken from them, and that patents then issue to such parties for the entries as thus amended.

Some of the lands in the disputed strip belong to the Government, and for this reason I believe that the Department has the jurisdiction to reopen the matter.

Record herewith.

Very respectfully,

FRED DENNETT,
Commissioner.

10

Mr. Assistant Attorney General Kearful, with whom *The Solicitor General* was on the brief, for appellant.

Mr. F. W. Clements, with whom *Mr. Alex. Britton* was on the brief, for appellees.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellees to restrain the Secretary of the Interior from carrying out a resurvey of a part of the boundary of a Mexican grant. The plaintiffs hold the legal title to the grant and the adjoining land belongs to the United States. The boundary was surveyed by one Hancock and on June 22, 1872, the grant was patented. A bill to set aside the patent was dismissed in *United States* v. *Hancock*, 133 U. S. 193, (1890.) Doubts having arisen as to where a portion of the Hancock line on the northern boundary ran, the Land Department employed one Perrin to make a resurvey. It found and reëstablished the original monuments except between Hancock's stations 20 and 25, and attempted to fix the line between these also. In 1901 the resurvey was approved by the Commissioner of the General Land Office, but in 1902 on an appeal, the Secretary of the Interior reversed the approval and ordered a new survey of the line between stations 20 and 25. This was made by one Sickler and was approved by the Secretary of the Interior on February 28, 1907. On September 5, 1913, the Secretary vacated the Sickler survey and ordered the reëstablishment of the Perrin line. The present bill to restrain the carrying out of this order was dismissed on motion by the Supreme Court of the District of Columbia but the decree was reversed and an injunction ordered by the Court of Appeals.

The bill, of course, is not a bill against the United States brought on the ground that it is claiming land

belonging to the plaintiffs. The bill does not seek to try the title. It is brought on the ground that the power of the Secretary is exhausted, and it may be doubted whether that is a matter with which the plaintiffs have anything to do. But however that may be, the whole proceeding on behalf of the United States is simply an effort to fix the boundaries of its own land. It is recognized, it was recognized when the Perrin survey was set aside, that the United States has no authority to change the Hancock line; but it has a right for its own purposes to try to find out where that line runs and the fact that its conclusions may differ from that of the owners of the Hancock grant does not diminish that right. So long as the United States has not conveyed its land it is entitled to survey and resurvey what it owns and to establish and reëstablish boundaries, as well one boundary as another, the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law. If, as the result of the survey adopted, the United States should give patents for land thought by the plaintiffs to belong to them, "the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the court." *Litchfield* v. *The Register*, 9 Wall. 575, 578. *Minnesota* v. *Lane*, 247 U. S. 243, 250.

We know of no warrant for the notion that the power is exhausted by a single exercise of it. Repeated retracement of lines, although, of course, exceptions, are well known, we believe, to the Land Department, as, with the limitation that we have expressed, there is no reason why they should not be. The case is different when the act of the Secretary is directed to a third person, as for instance, the approval of a map of the location of a railroad over public lands, where the approval operates as a

grant. *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165. See *New Orleans* v. *Paine*, 147 U. S. 261, 267. But this retracing of the Hancock line is not directed to the plaintiffs, but, as we have said, is an investigation by the United States on its own account. The plaintiffs gained no rights by the approval of the Sickler line; they lose none by the substitution of the Perrin line. These acts were neither adjudications nor agreements. The plaintiffs' rights were fixed before. Even after land had been sold with reference to a survey and plat that had been approved, this Court refused to restrain the Secretary from making a new survey in *Kirwan* v. *Murphy*, 189 U. S. 35. See *Lane* v. *United States ex rel. Mickadiet*, 241 U. S. 201, 208. *Northern Pacific Ry. Co.* v. *United States*, 227 U. S. 355.

We are of opinion that the decision of the Court of Appeals was wrong.

Decree of the Court of Appeals reversed, with directions to affirm the decree of the Supreme Court dismissing the bill.

LANE, SECRETARY OF THE INTERIOR, *v.* DARLINGTON ET AL., TRUSTEES, ESTATE OF CLAPP.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 219. Argued March 12, 1919.—Decided March 31, 1919.

An official resurvey of the boundary of a patented Mexican grant, for the purpose of defining contiguous public land, does not operate as an adjudication against the grant owner or otherwise so affect his rights as to afford him ground for an injunction suit against the Secretary of the Interior.

46 App. D. C. 465, reversed.

THE case is stated in the opinion.